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MEMORANDUM.

On the 1st of October, A.D. 1890, RICHARD MARTIN MEREDITH, of Osgoode Hall, Barrister-at-Law, was appointed a Judge of the Supreme Court of Judicature for Ontario.

On the same day, The Honourable RICHARD MARTIN MEREDITH was appointed a Justice of the High Court of Justice for Ontario.

On the same day, The Honourable RICHARD MARTIN MEREDITH, was appointed a member of the Chancery Division of the High Court of Justice of Ontario.

ERRATA.

- Page 113. Line 4 of head lines, for "R. S. O. ch. 129," read "R. S. C. ch. 129."
- " 169. Line 16 of head note, for "272," read "276."
- " 204. Last line of head note, for "waiver," read "waive."
- " 409. Last line of head note, for "refuse," read "refused."
- " 430. Line 13 from top, for "4 Gr. 494," read "4 Gr. 394."
- " 484. Line 12 from bottom, for "9 Ch. 237," read "L. R. 9 Ch. 237."
- " 572. First line of head note, for "A plaintiff," read "The plaintiff."

ENTERED according to the Act of Parliament of Canada, in the year of
our Lord one thousand eight hundred and ninety by the THE LAW
SOCIETY OF UPPER CANADA, in the Office of the Minister of Agriculture.

ROWSELL AND HUTCHISON, LAW PRINTERS, KING STREET.

J U D G E S
OF THE
HIGH COURT OF JUSTICE.

DURING THE PERIOD OF THESE REPORTS.

QUEEN'S BENCH DIVISION :

HON. JOHN DOUGLAS ARMOUR, C. J.
" WILLIAM GLENHOLME FALCONBRIDGE, J.
" WILLIAM PURVIS ROCHFORD STREET, J.

CHANCERY DIVISION :

HON. JOHN ALEXANDER BOYD, C.
" WILLIAM PROUDFOOT, J.
" THOMAS FERGUSON, J.
" THOMAS ROBERTSON, J.

COMMON PLEAS DIVISION :

HON. SIR THOMAS GALT, KNT., C. J.
" JOHN EDWARD ROSE, J.
' HUGH MACMAHON, J.

Attorney-General :

HON. OLIVER MOWAT.

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DECIDED IN THE

QUEEN'S BENCH, CHANCERY, AND COMMON
PLEAS DIVISIONS.

OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[CHANCERY DIVISION.]

RE BUSH.

Executors and administrators—Removal of executor—Trustee Act, 1850.

An executor cannot be removed from his position, where anything remains to be done appertaining to his office, even although the will provides for his continuance as a trustee thereunder after his duties as executor have ceased, and he has acted as trustee by investing part of the trust moneys.

In re Moore, McAlpine v. Moore, 21 Ch. D. 778, distinguished.

THIS was an application by petition by George McKeand ^{Statement.} and others interested under the will of Thomas Bush, deceased, for the removal of one Robert Dowd Kennedy, an executor and trustee under said will, who had left the Province of Ontario for parts unknown, and the appointment of one William J. Robinson in his place and stead.

The testator's estate had all been properly administered and wound up with the exception of an investment of a sum of \$5,000 on mortgage securities, in the manner and for the purpose of applying the interest thereof as directed by the will [set out in the judgment]. \$3,500 of that amount had been so invested, but \$1,500 of bank stock belonging to the testator, had to be realized for the pur-

Statement. pose of investment in the same manner to complete the \$5,000, and for that purpose the appointment of another executor and trustee was asked.

The petition was argued on February 5th, 1890, before ROBERTSON, J.

J. M. Clark, for the petitioner.*

This executor-trustee should be removed. [ROBERTSON, J.—You cannot remove him as an executor.] No, so I ask to have him removed as a trustee, as it appears by the authorities that is all I am entitled to. The will directs the investment in mortgages of \$5,000 and the payment of the interest. \$3,500 of that has been properly invested in the name of the two executors, of whom Robert Dowd Kennedy is one and he cannot be found. \$1,500 was left by the testator in bank stock, and it is desired to realize this and invest it as directed by the will, which cannot be done without the appointment of a new trustee for the purpose. [ROBERTSON, J.—That \$1,500 is personalty, and is not administered yet.] A trustee can be appointed to perform the duties of an executor: *In re Moore, McAlpine v. Moore*, 21 Ch. D. 778. The Court has power to appoint a new trustee, if the trustee is residing abroad: *In re Bignoll Settlement Trusts*, L. R. 7 Ch. 223. A trustee and executor can be removed as a trustee; *In re Skinner's Trusts*, 2 W. R. 130; *In re Harrison's Trusts*, 22, L. J., (Chy.) N. S. 69.

February 8, 1890. ROBERTSON, J.:—

The late Mr. Thomas Bush, who died in February, 1887, by his will dated in 1881, appointed Kenneth Dingwall, Robert Dowd Kennedy, and Thomas Orton, to be the executors and trustees thereof; and he directed that his

*Substitutional service had been made by order and no one shewed cause.—REP.

executors should convert all his estate, real and personal of whatever kind, and wheresoever situate into money, and out of the same to pay his debts, testamentary and funeral expenses; and *inter alia* he made the following bequest: To his daughter Susannah McKeand, during her natural life, and after her death, to her husband, George McKeand, during his natural life, should he survive her, the interest arising from \$5,000, which he directed his "trustees" to invest in mortgages on real estate, during the lives of the said Susannah McKeand and George McKeand, and the survivor of them, and to pay the interest thereof to the said Susannah McKeand during her life, and after her death to the said George McKeand during his natural life, should he survive her, as and when the same becomes due and is paid; and after their death, the said sum of \$5,000 to his daughter Ann Orton; and if she should predecease them, then to her children surviving the said Susannah McKeand and George McKeand in equal shares.

The executor, Kenneth Dingwall and the daughter Susannah McKeand, both predeceased the testator; and probate of the will was duly granted to the other executors, Thomas Orton and Robert Dowd Kennedy, who have paid all the debts, testamentary and funeral expenses, and the legacies contained in his will, other than the said bequest of \$5,000; but in or about the month of January, 1889, the said Robert Dowd Kennedy departed from the city of Hamilton to parts unknown and has not since been heard of, although careful and diligent enquiry to ascertain his whereabouts have been made, and it is believed by the petitioners, that he has left the Province of Ontario.

Prior to the departure of Kennedy, he and his co-executor, Orton, invested \$3,500 of the said \$5,000 in mortgage on real estate; and the remaining \$1,500 is invested in Bank of Hamilton stock, where it was at the testator's death, awaiting an investment in a mortgage on real estate, and which the executor Orton cannot at present invest as directed by the will, as it is alleged, owing to his co-executor having departed as aforesaid.

Judgment. The foregoing facts were set forth in a petition to this Court by the said George McKeand and Ann Orton, Laura Robinson, (*née* Orton) wife of William J. Robinson, Thomas Orton, the executor, and Henry G. Orton, all parties interested under the will; and they pray that an order may be made removing the said Robert Dowd Kennedy from the executorship and trusteeship, and substituting for him William J. Robinson, the husband of one of the petitioners, so that the intention of the said testator, touching the investment of the said \$5,000, may be fully effected; and that an order may be made vesting the mortgage for \$3,500 and the lands therein described, and the moneys secured thereby, and the benefits of all covenants and provisoes therein contained; and also the said \$1,500 now in bank stock, in the said William J. Robinson and Thomas Orton, as executors and trustees of the said will, in the place and stead of the said Robert Dowd Kennedy, &c.

By order of the Master in Chambers, substitutional service of this petition was made on S. F. Lazier, Esq., who was appointed by power of attorney made by the said Robert Dowd Kennedy before he left Hamilton, to act for him in all matters concerning or connected with the said will, and upon the wife of the said Kennedy.

It appears also by the petition that all the debts, funeral and testamentary expenses of the testator, and all the legacies (other than the legacy of \$5,000) have been paid; and all matters connected with the estate, other than the said \$5,000, have been wound up and settled, and releases to the executors of all claims (except the \$5,000) have been duly executed by the parties entitled under the will.

So far, therefore, as the duties appertaining to the executorship are concerned, it appears that there only remains to be disposed of under the will, this sum of \$1,500, and if that had been invested as directed by the will, the executor would have dropped that character *and become a trustee* in the proper sense, and the Court would then unquestionably have power on a proper case being

made out to remove him as trustee, and appoint another person in his stead : Lewin on Trusts, 8th ed., p. 673. But where there is anything to be done under the will appointing, which comes within the province of the executorship, I know of no authority in this Court to remove him from office as executor, and to appoint another in his place. Judgment.
Robertson, J.

In *Re Moore, McAlpine v. Moore*, 21 Ch. D. 778, the testator had by his will left all his property to his wife for life, and appointed her his sole executrix ; and had also left legacies of considerable amount to be paid after her death, but had not constituted any persons trustees thereof : *Held*, upon petition in an administration action commenced for the purpose, and in the Trustee Act of 1850, that *upon the retirement of the widow*, the Court had jurisdiction under the Trustee Act, 1850, to appoint in her place a trustee or trustees *to perform the duties incident to the office of an executor* ; but that is not an authority for granting the prayer of the petition in this matter. There the widow and sole executrix joined in the petition in which it was stated that she was desirous of retiring from such trusteeship. Then there was this peculiarity in the case. The widow being sole executrix, and the legacies not being payable until after her death, there was in fact no one to protect the trust property, or to administer the trusts in case of her death.

Kay, J., in giving judgment, said " I think the difficulty is removed by the interpretation clauses of the Trustee Act, 1850, which defines the words " trusts " and " trustees," as extending to and including " the duties incident to the office of personal representatives of a deceased person ; " so that although the Court cannot remove an executor, it can appoint a trustee to perform the duties of an executor, which, in this case, means to pay the legacies when they become payable. But in a subsequent case *Re Phelps' Settlement Trusts*, 53 L. T. N. S. 27, the same learned Judge refused to appoint a new trustee or to remove one, " without his consent first had and obtained, but that was the case of a trustee and not of an executor ; " although he

Judgment. was very old and infirm, so much so, that his great age had
Robertson, J. impaired his memory, and his extreme deafness had rendered it so difficult to communicate with him, that it was practically impossible for him to transact any business.

In *Re Bignold's Settlement Trusts*, L. R. 7 Ch. 223, it was decided that the Court has power under the 32nd sec. of the Trustee Act, 1850, to appoint a new trustee, the old trustee permanently residing abroad, without his consent. And this case was decided previous to *In re Phelps*, just referred to, but was not followed in that case, and it was the case of a trustee also, and not that of an executor.

No case has been cited, nor have I been able to find one which applies to the facts and circumstances in this matter. The nearest approach to it, is *In re Moore, McAlpine v. Moore*, referred to above, but there is wanting in this the fact of the consent of the executor, who it is now sought to remove, and that fact even in the case of a trustee was considered by the same learned Judge, who granted the application, in the last mentioned case, to be an insuperable barrier in the *Phelp's Case*.

I have always understood it to be the law that the Court has no power to remove an executor; he is the appointee of the testator, and the Court cannot interfere so long as he is an executor and there is personal estate to administer.

Had this executor performed the whole of his duties *quoad* executor, and by investing the remaining \$1,500 of the \$5,000 directed to be invested in mortgages on real estate, then his duties as executor would have ceased, and he would have become a trustee; and then, if a proper case could be made out, and the petition had been properly intitled, "In the matter of the Trustee Act, 1850," which is not done here, but which I do not allow to influence my judgment, inasmuch as I would allow an amendment in that respect, a new trustee might be appointed.

It was requested at the bar, in case I could not remove the absent executor, that I should remove him as a trustee in regard to the mortgages taken on the investment of the

\$3,500 ; but I do not see my way to comply with that request, even had the petition been quite regular and had it prayed for that partial relief. On the whole, the prayer of the petition cannot be granted.

G. A. B.

• [CHANCERY DIVISION.]

RE CENTRAL BANK AND HOGG.

Company—Winding-up proceedings—Infant stockholder repudiating liability as contributory—Laches—Acquiescence.

The petitioner's father signed her name to a stock subscription book of a bank, paid the calls, and received the dividend cheques, which were endorsed by her at her father's request, the moneys being received by him. The Bank was put into liquidation by winding-up proceedings, and the order for call against contributories was made three months before she came of age.

A year after the liquidation commenced she took proceedings to have her name removed from the list of contributories :—

Held, That she was not liable as a contributory and that her name must be removed from the list.

THIS was an application by petition of Kate Hogg to have her name removed from the list of contributories of the Central Bank of Canada, on the ground that she was an infant at the time her name was subscribed for the shares of stock.

It appeared by the evidence that while the petitioner was under age, her father had signed her name to the stock subscription book, paid the calls, and received the dividend cheques which he had brought to her, and obtained her endorsement thereon ; she did not receive the proceeds, and was not aware of any of the winding-up proceedings or notices of the bank, except one set of papers which were sent to her, but she did not understand them, and when she asked her brother about them, he told her not to trouble about them, and she destroyed them.

The order for call against the contributories was made on 31st October, 1888. The petitioner came of age on January 31st, 1889, and this application was made on October 30th, 1889.

Argument.

The petition was argued on February 19th, 1890, before BOYD, C.

Hoyles, for the petitioner. The petitioner did not sign the stock book, and was not aware of her name being so used. Even if she did endorse the dividend cheques she only did so at the request of her father, and he received the money. Such endorsements by her while an infant did not adopt the contract, nor did they even acquiesce in it. The petitioner has been prompt in applying, and should have her name removed from the list of contributories. I refer to *In re Alexandra Park Co.—Hart's Case*, L. R. 6 Eq. 512; *In re Commercial Bank Corporation of India and the East—Wilson's Case*, L. R. 8 Eq. 240; *Lumsden's Case*, L. R. 4 Ch. 31; *In re Contract Corporation—Baker's Case*, L. R. 7 Ch. 115. In *Foley v. Canada Permanent, &c., Co.*, 4 O. R. 38, the plaintiff, an infant, made the contract, signed the mortgage and subsequently admitted liability, and these facts distinguish it from the present case.

Hilton, for the Bank, contra. The petitioner's delay from January 31, the time of her coming of age until October 30th, the date of this application, was too long. She was guilty of laches. Her endorsement of the cheques was an adoption of the contract which had been signed for her, she had notice of calls while under age, and all the liquidator's notices were regularly mailed to her address. I refer to *Foley v. Canada Permanent, &c., Co.*, 4 O. R. 38, and the cases there cited; *Holmes v. Blogg*, 8 Taunt 35, where four months' delay was held too long; *Featherston v. McDonell*, 15 C. P., at p. 166; *Ashton v. McDougall*, 5 Beav. 56; *In re Yeoland's Consols—White's Case*, 1 *Megone's Co. Cases*, 39, 58 L. T. N. S. 922; *Simpson's Law of Infants*, 67.

February 20, 1890. BOYD, C.:—

The principle of law which applies to this case, is thus laid down in Lindley on Companies, p. 810: "If an infant is a shareholder when the winding-up commences, or if he

is not then precluded from repudiating his shares, he does not lose that right by mere delay. *Shrapnell's Case*, before Lord Romilly in April, 1867, is referred to, where an infant had applied and paid for shares, had paid calls and received dividends, but only attained his majority a week before the company stopped payment. Three months after he was settled on the list of contributories after due notice, but he paid no attention to it, and allowed the time for varying the certificate to expire. A call was afterwards made on him as contributory, and even then he was allowed in on payment of costs, and succeeded in getting himself removed from the list. He had done nothing it is said after attaining twenty-one, which could be regarded as an election to take the shares, and his repudiation was held not to be too late. The present case is not nearly so favourable for the bank in the attempt to render the applicant responsible for the "double liability."

Judgment.

Boyd, C.

She did not subscribe nor pay anything on the stock. Though she endorsed dividend cheques, it was while an infant, and at the direction of her father, who received the money therefor. She was twenty-one on 31st January, 1889, after the winding-up proceedings were far advanced. On 29th October, 1888, the order for call on contributories was made, but she had no notice of this or of any other proceeding on the part of the company after she attained majority till October, 1889, and then she at once repudiated the claim of the liquidators. I find no authority which would justify fixing her with liability, and more than one exculpating her. If any one is liable for these shares, it was her father or her father's estate, he having died; but this question is not now before me, nor do I pretend to do more than allude to this, as it was mentioned during the argument. Following *Hart's Case*, L. R. 6 Eq., 512, I discharge the petitioner as contributory, but give no costs to her. The liquidator's costs will be out of the fund as in *Hart's Case*.

G. A. B.

[CHANCERY DIVISION.]

BEER V. STROUD.

Waters and watercourses—Definition of watercourse—Surface-water.

A watercourse entitled to the protection of the law is constituted if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and defined channel. It is not essential that the supply of water should be continuous or from a perennial living source. It is enough if the flow arises periodically from natural causes and reaches a plainly-defined channel of a permanent character.

Statement. THIS was an appeal from the judgment of FERGUSON, J., in an action brought by Josiah Beer against Alfred Stroud for an injunction to restrain defendant from banking up earth on his land, so as to prevent water running away from the plaintiff's land in the manner it had always done before.

The action was tried at Hamilton, on October 25th, 1887, before FERGUSON, J.

Mackelcan, Q. C., and Gausby, for the plaintiff.
Bell, for the defendant.

The learned Judge delivered the following judgment.

October 27, 1887. FERGUSON, J.:—

According to my understanding of what a water-course is, I think it is proved here that there is a natural water course in regard to which there exist riparian rights.

There is a pretty large area of land a little above the head of what has been called the ravine that is nearly level. There was a point further on, in which in a state of nature there was a pond of water of some depth, excepting in very dry seasons; when the water raised in that pond it overflowed its margin on the side next to this ravine or creek, and formed a run of water down to what may be called the stream proper.

[The learned Judge after a *resumé* of part of the evidence then proceeded as follows]: I find then as a matter of fact that several rods from the lane running between the plaintiff's land and that of the defendant, and on the plaintiff's land, there were by nature defined banks in the formation of the stream, a stream that had its source, that is the source of its waters from the drainage of this level area of land, and the overflow of this pond, to which I have referred; and upon the plaintiff's land waters were collected and were within defined banks, several rods from its eastern boundary. Then from that place across the lane, and through the defendant's land down to the Macklem survey, and finally into the waters of Lake Ontario where these waters went, I think there was a natural stream. The fact that in their course the waters passed through a sort of marsh below the lands of the parties makes no difference. There is a stream or current all the way, though not running the whole of the year, yet not limited to times of rain or melting snow, as sought to be made out. The banks were originally well defined.

Judgment.
Ferguson, J.

It was urged that there was no spring or underground source of these waters—that it was merely surface water. I think that makes no difference whatever. The beginning of a defined stream may be surface water only, there need not be a spring shown to be from the depth or bowels of the earth to be the source whence a stream starts. In a basin the surface water may collect, and a stream may form running therefrom between defined banks.

This is a stream of that kind, being fed also by the overflow of a pond, until a ditch was cut in another direction draining the pond; and my opinion is, that it was a natural water-course, in regard to which there were riparian rights.

The plaintiff then had a right to have the water pass in that natural water-course between these banks that are yet apparent upon the land several feet high, approaching one another, no regard being had to the mould that has been thrown up on each side of the artificial ditch. They approach one another gradually, but tolerably rapidly. They come together at the bottom, and the evidence shews there was a water-way cut a foot and a half wide, or thereabouts, and some six inches deep where these banks met. There the plaintiff had a right to have the waters pass.

Now the defendant threw earth upon his land, and so raised it, that there is no doubt the waters at that place

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Ferguson, J.

could not pass away from the plaintiff's land as they did when the place was in its natural condition.

The defendant has obstructed the flow in a natural water-course, in my opinion. That obstruction the defendant must remove.

The relative height or the level of the bottom of the water-course as defined by Mr. Kline, (whose evidence I thought most reliable) as compared with the height of the obstruction made by the defendant, is not proved. That the ground at that place : that the bottom is not now as it was in a state of nature, I have no doubt. It has been deepened by some means, by digging, I think, and I do not know what its original level was, but whatever that was, it was surely lower than the embankment or filling in that has been made by the defendant upon his land. He has obstructed the natural flow.

Then, if there were no more, I think the defendant should be ordered to remove the obstruction that he has placed there to the depth of this course mentioned by Mr. Kline, that is, to the level of that where it came to the defendant's land.

There may have been some considerable inclination in that course between one side of the lane and the other. The land falls away upon the defendant's property pretty rapidly ; but if the plaintiff's right depends entirely upon the natural water-course, the defendant will have to remove the obstruction to the depth of the bottom of the natural course, so that there will be no obstruction above the level of such bottom to the injury of the plaintiff.

It will not do for the defendant to dig a narrow trench upon his land through the embankment he has made to that depth, because that would probably not carry off the water to the same surface level at the time of high water that would have been done if he had not put the obstruction there.

The plaintiff is entitled to the full width of the stream, so that the surface of the water, in time of high water, will not be higher than it would have been if he (the defendant) had not put the embankment there ; and the bottom of the stream were at its natural height or level. The plaintiff is entitled to have the water-flow from the southerly side or boundary of his land at no greater height than it would have done if the defendant had not put the embankment there, and the bottom of the stream were of the same height as the bottom mentioned by the witness Kline.

The plaintiff also contends that he has by prescription the right to the use of the stream as it is now, or rather as it was immediately before the obstruction complained of. Judgment.
Ferguson, J.

The natural depth I find not to be as low as the bottom of the ditch across the lane is now, but I cannot say how much the difference is. I am not given evidence on that subject.

I do not see that the plaintiff has established a prescriptive right to the use of the stream at the depth at which it is. There is evidence of cleaning out, which cleaning out I think was rather abundant, and being satisfied that the stream is now lower than it was in a state of nature, and not being given any evidence of any time when it was dug out to make it lower, I think it has been made lower by this so-called "cleaning out."

The kind of material that appears on either side of the stream, where the bridge is now, manifestly taken out of the bottom, and the shape and formation of the banks as they approach down towards the stream indicate to me that the natural bottom was not as low as the bottom of the ditch is now. My view of the matter is, that there has been a deepening some time or other of the stream across the lane; that the natural bottom was not as low as the present one.

There is evidence of user by the plaintiff, and those who preceded him in title of that place as a ditch or stream for a period much over the twenty years, and I find that there has been such user; but the evidence does not reach the point of showing that the user was during all this period to the present depth.

The plaintiff has not shown that at any time the bottom of the natural stream was lowered by him or his predecessors in title and used thereafter for the purpose of his land for the necessary period. His contention is that it is no lower than it was by nature, so I cannot find that he has proved a user for more than twenty years of a stream there lower (having a bottom lower) than the bottom was by nature, and that bottom was not so low as the bottom is now. That is one of the difficulties that I see between the parties.

The difficulty in any judgment that I can deliver upon the evidence defining the exact right, if it be a right, differing from that in respect to the natural stream, is the difficulty of showing just what the defendant must do to remove the obstruction, because the plaintiff cannot have

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Ferguson, J.

the land of the defendant excavated one inch lower than his legal right demands. The difficulty is in defining what the defendant is to do.

The plaintiff has only shown this, that he is entitled to have the obstruction placed there by the defendant removed to a height or depth that will meet the level of the bottom of the natural stream, and to have the defendant remove his embankments to such a width that the surface of the water in time of high water will not be higher than if he had not put the embankments there, and the bottom were no lower than it was by nature—that is to give the stream a bottom and width to carry off the water as it would have flown, the place being in its natural condition. Now I cannot say on the evidence that the defendant is to do more than this.

The plaintiff's case in respect to the natural channel or water-course is, I think, a stronger one than the one mentioned in the 7th ed. of Angell on the Law of Water-courses see p. 131, and referred to by plaintiff's counsel. There the surface of the plaintiff's land was somewhat elevated, and inclined gradually towards the defendant's land. The surface of the plaintiff's land was such as to collect, in wet times, and always after heavy rains, a large body of water on her land. This water collected into a narrow but well defined channel on the same land, and passed off through a like channel over the land of the defendant, and finally emptied itself into a creek. The channel was originally made, and was continued by the natural flow and force of the water, and the same channel had always discharged the water as far back as the memory of the witnesses went. The defendants obstructed this channel, and caused the water to flow back on the plaintiff to her injury. The Chancellor said, "This water has run in the same course for more than twenty years, and the plaintiff, and those under whom she holds, having enjoyed it as a right during that period in its present channel, no one has a right to dam the channel or to divert the course of water to the injury of the plaintiff's land. It makes no difference whether it is a natural water-course or an artificial ditch."

In the present case the plaintiff and his predecessors in title, unless there was the acquiescence in the interruption hereafter to be referred to, no doubt enjoyed as of right the flow of this water away from the plaintiff's land upon a level as low as the bottom of the natural channel for a

period of more, much more than twenty years next before the commencement of this action, and this much to the advantage of the land. The plaintiff's case in regard to the stream seems to be sustained in two ways, by his right as riparian proprietor, and by prescription, but only to the extent that I have said.

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Ferguson, J.

I may here say, perhaps it is my duty to say, that there were many of the witnesses for the defendant to whose testimony I do not attach any weight. Some of them (after my having seen the place at the request of both parties) I cannot believe. Others appeared reckless in the witness box, and some did not seem to understand the subject, manifestly thinking that they were right, and justified in saying that there was not a water-course there, because when they saw the place they did not perceive that there was a furrow dug out by the action of the water, although there were defined banks closely approaching one another between which the water ran, or had run. The authorities referred to by the counsel for the defendant, refer for the most part, if not solely to cases of surface water as such, and do not, I think, apply to or govern the present case.

What I have hitherto said has been without any reference to the statement in the defence that the interruption of the enjoyment by the plaintiff of the right in question has been acquiesced in for the period of more than a year before this action. No doubt more than a year elapsed after the interruption by the construction of the embankment or "filling in," as it was called, and before this suit.

In the case of *Glover v. Coleman*, L. R. 10 C. P. 108, the question of acquiescence or not in the interruption, was much discussed. In that case the year had elapsed as in the present case, the fact was held not to be fatal to the plaintiff, and it was considered that it was a question proper to be left to the jury whether or not there had been a submission to or acquiescence in the interruption.

In the present case the plaintiff says that until he was injured, and sustained the damages of which he complains in the month of February last, he was not aware of what the defendant had done. He shews that although the place was near his property, he did not approach the property by that way, and that his attention was not called to the fact of what the defendant was doing. I need not say more respecting the evidence on this subject. I think it a proper finding to say that there was not notice of the interruption to the plaintiff until the time the injury

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Ferguson, J.

was sustained, which was much less than one year before this action : and the statute says that no act or other matter shall be deemed an interruption within the meaning, &c., unless the same has been submitted to or acquiesced in for one year after the party interrupted has had notice thereof, and of the person making, or authorizing the same to be made.

I am of the opinion that the proper finding or conclusion in the case is, that the interruption had not been submitted to or acquiesced in by the plaintiff for one year after notice, &c., and that the plaintiff should succeed upon the issue.

I am of the opinion that the plaintiff is entitled to judgment in his favour, and to recover from the defendant the sum of \$150 as damages, the amount of which is really not disputed, if it be assumed that the plaintiff is entitled to recover at all.

I am also of the opinion that the plaintiff is entitled to an order against the defendant for the removal of the obstruction, the embankment, or "or filling in," to the depth of the level of the bottom of the water-course as it was naturally, and this in such a manner, that the water may flow away from the plaintiff's land as freely as it did when the place was in a state of nature. The evidence does not, so far as I can see, afford me, by comparison with existing objects or otherwise, the means of stating more precisely, or with more practical effect, what this order should be.

I also think the plaintiff entitled to an injunction restraining the defendant from obstructing the flow of the water as lastly above mentioned.

The plaintiff thus succeeds as to one branch of the case and the recovering damages. To this extent there is judgment in his favour, with costs. As to the other branch of the case* (that respecting the right of way) the action is dismissed, with costs.

From this judgment the defendant appealed to the Divisional Court, and the appeal was argued on February 27th, 1888, before BOYD, C., and ROBERTSON, J.

Osler, Q. C. and *Bell* for the appeal. The evidence shews that the alleged water-course was a mere valley or

*A claim made to a right of way disposed of on the evidence, and omitted from the judgment.—REP.

ravine for surface water. Any semblance of a stream has been destroyed by the defendant digging for brick clay, and the water is thus distributed. The evidence does not show that this digging caused the penning back of the water. Angell on Water-courses, 6th ed. sec. 108a. There has been acquiescence for over a year R. S. O. (1877) ch. 108 sec. 37. We refer to *Darby v. The Corporation of Crowland*, 38 U. C. R. 338; *McGillivray v. Millen*, 27 U. C. R. 62; *Crewson v. The Grand Trunk R. W. Co.*, *Ib.* 68; *Murray v. Dawson*, 19 C. P. 314.

Mackelcan, Q. C., contra. The trial Judge saw the *locus in quo*. The plaintiff has the rights of a riparian proprietor, and also by prescription: *Glover v. Coleman*, L. R. 10 C. P. 108; *Earl v. De Hart*, 12 N. J. Eq., 1 Beasley Ch. (N. J.) 280; *Briscoe v. Drought* 11 Ir. C. L. R. (1860) 250; *Claxton v. Claxton*, Ir. R. 7 C. L. (1873) p. 23; Angell § 108b; *Magor v. Chadwick*, 11 A. & E. at p. 586; *Beeston v. Weate*, 5 E. & B. at pp. 996-7; *Bennison v. Cartwright*, 5 B. & S. at p. 17. No change of character affects the legal right to a water-course.

Osler, Q. C., in reply. The plaintiff's claim is either as an easement or a riparian proprietor, Angell § 42. It is claimed here as a natural water-course. It is not an easement. See also Angell § 108, *i* and *o*.

June 11th, 1888. BOYD, C. :—

The whole of the evidence establishes that the natural drainage of the plaintiff's land has been always through the swale or ravine leading down to the defendant's land, and thence by a living stream into Lake Ontario. Some of the evidence shews that the course of the water has worn a way for itself with well-defined banks as it neared the defendant's boundary. The defendant's son spoke of it as a "gully," and I cannot doubt that the flow of the rain- and surface-water for the twenty-five or thirty years spoken of, has left distinctive and continuous traces of its

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Boyd, C.

course, which form a visible landmark from the plaintiff's into the defendant's property.

Any doubt raised by the evidence on this point would be dispelled by the finding of the trial Judge who, at the instance of the defendant, visited the premises, and so checked the opinions of witnesses by his own observation.

Rain- and surface-water has drained from the high lands of the plaintiff through this natural outlet during the thirteen years of his occupancy till it was interrupted by the defendant who, for his own purposes, blocked up the channel, if not entirely at least to such an extent as to cast back water to the plaintiff's loss. The very fact of the defendant having left some opening for the water as he made his alterations, is very suggestive of the actual existence of a water-course.

It was open, on the evidence, for the Judge to affirm the existence of a water-course entitled to the protection of the law. To this end it is not essential that the supply of water should be continuous, and from a perennial living source. It is enough if the flow arises periodically from natural causes and reaches a plainly-defined channel of a permanent character. Thus a recognized "course" is obtained, which is originated and ascertained and perpetuated by the action of the water itself. For all practical definition, if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and defined channel, that constitutes a water-course.

In *Briscoe v. Drought*, 11 Ir. C. L. at p. 264, Hughes B., is thus reported: "If it is proved that rain-water forms itself, from the nature of the locality upon which it descends, into a visible stream, and as far back as memory can extend, has pursued a fixed and definite channel for its discharge, the 'volume' of the stream may be 'occasional' and 'temporary;' but its 'course' is neither 'occasional' nor 'temporary.' I am, therefore, of opinion that, in this case, there was a water-course," &c.

By the civil law it was considered that land on a lower level owed a natural servitude to that on a higher, in res-

pect of receiving without claim to compensation, the water naturally flowing down to it: Per Cresswell, J., in *Smith v. Kenricke*, 7 C.B. at p. 566. Such is, I think, also the common law when the rain- or surface-water has from the trend of the land formed itself into a defined channel, and so discharges itself through the servient tenement. The occupant below has no right in such a case to interfere with the natural outlet from the land above by the erection of obstructions or the filling in of the channel.

This question as to the rights in surface-water after getting into defined channels has been but little considered in England. The two cases usually cited to shew that surface water may be interfered with, *Broadbent v. Ramsbotham*, 11 Exch. 602, and the other case in the same volume at p. 369, *Rawston v. Taylor*, both relate to surface-water not flowing in any defined watercourse, as pointed out by Lord Chelmsford in *Chasemore v. Richards*, 7 H. L. C. at p. 375.

Ennor v. Barwell, 2 Giff. 410, is a useful case, decided contemporaneously with *Briscoe v. Drought*, *supra*, and favouring the view I have now taken.

The greater bulk of later American authority is also in this direction, and of these cases I may particularly refer to *Kelly v. Dunning*, 39 N. J. Eq. 482, (1885) and a well-considered judgment in *Boyd v. Conklin*, 54 Mich. 583 (1884) in appeal from 46 Mich. 56.

As to the other points argued there is nothing to shew that the Judge's conclusion is not well-founded. A good deal seems to have turned upon the credibility of witnesses, and it would appear to me to be most unsafe to interfere upon evidence so conflicting when at the request of both parties the Judge satisfied himself as to where the truth lay by ocular inspection of the *situs*.

The judgment should be affirmed with costs. The result of it is, as I understand, that the defendant may use his land as he likes so long as he does not obstruct the flow of water on the plaintiff's land. It was said that the effect of the decision was, to require the defendant to keep the sides of the ravine open. I do not so read the reasons

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Boyd, C.

Judgment. for the judgment, nor do I think the law requires any
 Boyd, C. such restriction on the defendant's user of the land.

ROBERTSON, J.—I concur in the views and conclusions come to by the Chancellor.

G. A. B.

[CHANCERY DIVISION.]

GRANT V. CULBARD.

Hides—General Inspection Act—"Anything done under this Act"—*R.S.C. ch. 99, secs. 26, 96, 104—Action against inspector of hides—Pleading—General issue.*

In an action against a government inspector of leather and raw hides for fraudulently grading and branding incorrect weights and qualities on hides:—

Held, that "anything done under this Act," in *R.S.C. ch. 99, sec. 26*, has the same meaning throughout the section, and means "anything intended to be done under this Act"; and the defendant not appearing to have acted *malâ fide*, or to have intended not to perform his duty under the Act, was entitled to the protection of this section, though he had not pleaded the general issue in terms, inasmuch as he had in effect stated that what he did was done under the Act.

Semble, that full effect may be given to sections 96 and 104 of *R. S. C. ch. 99*, by holding that up to five per cent. of any deficiency or excess in the weight of certain kinds of leather the inspector is protected against any action, and as to any excess he is entitled to any defence open to him under the Act or otherwise.

Statement. THIS was an action brought by J. & T. Grant against Wm. G. Culbard for damages, under circumstances thus set out in the statement of claim:—

That the plaintiffs were tanners at Woodstock, and the defendant, who resides at Brantford, the duly appointed Government inspector of leather and raw hides for the city of Brantford, and that it was his duty to inspect all raw hides on application by the owner or possessor, and to ascertain the weight, quality, and condition thereof, and mark the same according to weight and quality: that the plaintiffs, at several times, purchased hides from F. Ott & Brothers, of Brantford, to be sold and purchased according to the inspection of the defendant: that it was the

defendant's duty to mark and stamp on the hides the net ^{Statement.} weight and quality, and the initials of the inspector and of the city or town where the inspection was made, and the figures required by the General Inspection Act, denoting the quality: that the hides so purchased by the plaintiffs had the brand or stamp of the defendant as such inspector duly stamped on the same, representing them to be of certain qualities and weights; that the plaintiffs purchased them relying on the correctness as to quality and weight of the hides as so stamped, and without making any personal examination: that afterwards they found them to be of an inferior class and much less value and weight than was represented by the branding or marking: that the defendant, with fraudulent intent, and in neglect of his duty, so wrongly branded the said hides, and, contrary to his duty, lent his marks and marking instruments to other persons, whereby the hides were wrongly marked and branded and the plaintiffs injured, and, contrary to his duty, gave a wrong certificate of inspection of the said hides.

By his defence, the defendant alleged that he had always performed in his office of inspector of hides the duties imposed upon him by statute, and knew nothing of any purchase by the plaintiffs from F. Ott & Brothers: that all raw hides inspected by him had been properly branded, stamped, and marked: that he was not liable to the plaintiff as for a false representation by false branding, and the paragraphs of the statement of claim in which this was alleged disclosed no cause of action; and he denied all fraud and all charges of neglect and violation of duty, and denied that he at any time lent his marks and brands to outside parties, or gave any false certificate of inspection as alleged.

The action came on for trial, on November 7th, 1889, at Woodstock, before ROSE, J.

Nesbitt and *Ball*, for the plaintiffs.

Blackstock and *Watts*, for the defendant.

Argument.

At the close of the plaintiffs' evidence, *Blackstock*, for the defendant, moved for a nonsuit.

Blackstock. The action cannot be maintained in this county. It should have been brought to trial at Brantford, and notice of action was requisite. Again, malice should have been proved, and it is not shewn that the action is within the six months: R. S. C., ch. 99, sec. 26. The defendant owed the plaintiffs no duty; he inspected for the vendor. R. S. C., ch. 99, sec. 16, points out the proper mode of proceeding.

Nesbitt, contra. The defendant is not a public officer. As to notice of action, I refer to *McLeish v. Howard*, 3 A. R. 503; but, at any rate, want of notice of action has not been pleaded; and the defendant should not be allowed to plead it now, for if he had done so before, we could have discontinued the present action, and brought a new one.

January 25th, 1890. ROSE, J.:—

Action against an inspector of hides for grading incorrectly, etc.

The defendant was appointed by the Governor-in-Council, pursuant to the provisions of the General Inspection Act, R. S. C., ch. 99, sec. 2. At least, it was so assumed, if not proven.

By sec. 7, every inspector is required before acting, to take an oath of office that he "will faithfully, truly, and impartially, to the best of 'his' judgment, skill and understanding, execute and perform the office of an inspector," etc.

By sec. 12, it is provided that "every inspector shall before acting as such give security for the due performance of the duties of his office * * and such bond shall avail to the Crown and to all persons aggrieved by any breach of the conditions thereof," etc.

For the construction to be put upon this section and the liability upon the bond, see *Regina v. John Mowat*, 3 C. P. 228. Judgment.
Rose, J.

Every inspector is bound to act upon request, under a penalty of \$20 over and above all damages occasioned to the person complaining by such neglect or refusal.—Sec. 20.

Sec. 26 is important. It is as follows: "Every action brought against any person for anything done under this Act, or contrary to its provisions, shall be commenced within six months next after the right to bring such action accrued, and not afterwards; and the defendant therein may plead the general issue, and that the same was done under this Act, and may give this Act and the special matter in evidence at any trial thereof; and if it appears so to have been done, then the judgment shall be for the defendant; and if the plaintiff is nonsuited or discontinues his action after the defendant has appeared, or if judgment is given against the plaintiff, the defendant shall recover treble costs, and shall have the like remedy for the same as defendants have in other cases.

It will be observed that the first clause providing for limitation of time is with reference to "anything done under this Act or contrary to its provisions," while the next clause providing for pleading directs that the defendant may plead "that the same was done under this Act;" and the next clause provides that "if it appears so to have been done, then," etc., that is, as I understand it, "if it appears that it was done under this Act as set forth in the plea, then," etc.

This section is peculiar in its provisions. I have not found anything similar to it, save in 4 & 5 Vic., chs. 88, 89, being Acts regulating the inspection of beef, pork, flour, and meal, and consolidated in C. S. C., ch. 48, sec. 26.

An examination of these sections may possibly throw some light upon the proper construction to be placed upon the section now under consideration.

In 4 & 5 Vic. ch. 88, the limitation clause is as to suits

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Rose, J.

in respect to things "done in pursuance of this Act or contrary to the directions thereof," when the action was to be brought within six months "after the matter or thing done or omitted to be done." The clause as to pleading and evidence permits a plea "that the same was done in pursuance and by the authority of this Act," and by the next clause, "if it appear so to have been done, then," etc.

In sec. 27 of ch. 89, the same language is used in the limitation clause, but the clause as to pleading and evidence provides merely that the defendant "may plead the general issue and give this Act and the special matter in evidence at any trial to be had thereon," and then follows that "if afterwards judgment be given for the defendant," etc.

Sec. 26 of ch. 48, C. S. C., is similar to sec. 26 of ch. 88, of the 4 & 5 Vic., both as to the limitation, pleading and evidence clauses, save that in the pleading and evidence clause, instead of the words "that the same was done in pursuance and by the authority of this Act," are the words, "and that the same was done under this Act."

Such provisions apparently permitted a plea of the general issue and evidence to be given thereunder of the Act and special matter, and that the same was done under the Act.

The section in question has in its limitation clause the words, "within six months next after the right to bring such action accrued," instead of the words, "after the matter or thing done or omitted to be done."

And the defendant is permitted to plead "that the same was done under this Act," and "give this Act and the special matter in evidence at any trial thereof."

This examination seems to explain the presence of the words, "or contrary to its provisions," which having regard to the meaning put by the decisions upon the words, "done under this Act," seem to me not only unnecessary but as obscuring the meaning of the section.

It is manifest that if the officer had done the act com-

plained of under the Act, that is, under and in accordance with its provisions, no protection would be necessary, for upon proving such to have been the fact he must have judgment in his favour.

Judgment.

Rose, J.

I may extract a passage from the judgment of Palles, C.B., in the Exchequer Division, in *O'Dea v. Hickman*, 18 L. R. (Ir.) at p. 238, for reference to which I am indebted to my learned brother Osler, and which most clearly states the law. He says: "It is, of course, elementary that the words, 'in pursuance of the Act,' occurring in a section such as that before us, do not mean 'in strict pursuance,' as, if they did, the act complained of would be lawful and could not be the foundation of an action. The protection of notice would on that construction only exist where it was not required. It was therefore held, early after enactments of this description became usual, that 'in pursuance of,' in such a context, meant 'in intended pursuance of' the statute. It then became a matter of much controversy what acts were or might be 'in intended pursuance of' the statute; and it has, in modern times at least, been settled that the defendant must honestly and really (although mistakenly), believe that the act which constitutes the cause of action was in pursuance of the statute, and such belief should not be a mere, vague, general belief, involving matter of law only, or mixed matter of law and fact, but should be a *bonâ fide* belief in such a state of facts as, had it existed, would have justified the act, the subject of the action."

The judgment was affirmed on appeal: *ib.* vol. 20, p. 431. See, also, observations of Blackburn, J., in *Selmes v. Judge*, L.R. 6 Q.B., at p. 727, quoted by OSLER, J.A., in *Corporation of Bruce v. McLay*, 11 A.R., at p. 482. The words there were, "under the authority of an Act," etc. See, also, *Venning v. Steadman*, 9 S.C.R., at pp. 234-5, per GWYNNE, J.

Mr. Justice GWYNNE refers to ch. 89 of the Consolidated Statutes of New Brunswick, which may be read in the consideration of the section now under discussion. See,

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also, *Holland v. Northwick Highway Board*, 34 L.T.N.S., at p. 137, as to the meaning of "pursuant to statute."

In the light of these cases we may read, "anything done under this Act" as "anything intended to be done under this Act," and it will follow that, if the defendant was acting *bonâ fide*—intending to perform his duty under the Act—then under sec. 26 he was at liberty to plead the general issue and shew that he, in good faith, intended to do his duty, and this appearing, he would be entitled to judgment.

It is apparent that an anomaly exists, for by the first clause a limited protection is afforded, *i. e.*, six months' limitation, and by the remaining clause absolute protection. The first clause possibly is unnecessary in view of the remaining clauses.

If one construed "done under this Act" as "intended to be done under this Act," in the limitation clause, and literally in the remaining clauses, then the remaining clauses would be unnecessary, save as to the provision for treble costs, for, if the defendant had acted under the Act, he could successfully defend without any special protection.

According to my best judgment, the words, "done under this Act," must have the same construction placed upon them throughout the section, and the result is that, if I find that the defendant acted *bonâ fide* in the belief that he was doing his duty as an inspector faithfully and well, he is entitled to the protection of the clause, and so to judgment, subject to the question of pleading, with which I will deal presently.

And this construction is not without some reason, for, as a remedy is provided under sec. 12 as I have pointed out, it may well be that it was not intended that the inspector should be vexed not only with an action on the bond, but also on the case.

I have not overlooked secs. 96 and 104, but think that full effect may be given to them by holding that, up to five per cent., the inspector is protected against any action, and as to any excess he is entitled to any defence open to him under the Act or otherwise.

The defendant has not pleaded the general issue in terms, but he has in effect stated that what he did was done under the Act. The pleading is informal, but I do not think it is misleading, and in view of the observations made in *Bond v. Conmee*, 16 A.R., at p. 419, and cases there referred to, I think it my duty to allow the defendant to amend by formally pleading the general issue, and to set up in terms that what he did was done under the Act.

Judgment.

Rose, J.

I have not found it necessary to determine whether the "Act to protect Justices of the Peace and others from vexatious actions" applies. It is not formally pleaded, and so far as an amendment would be necessary to set up want of notice of action, I do not think I should allow it, for on the evidence I do not think its service would have been more than a matter of form, for I do not see how consistently with the defence any tender of amends could have been made. Moreover, to allow it now would defeat the action under the six months' limitation clause which we have been discussing.

As to the facts, *mala fides* must not be presumed, and on the evidence I am unable to find want of *bona fides*. The defendant may have made a mistake or have incorrectly graded the hides, as to which I have some difficulty in forming an opinion, owing to the neglect of the plaintiffs to examine the hides before submitting them to the process of tanning, even in its initial stages; but if the defendant has erred, I think I must find that he did what he did, honestly believing that he was doing his duty under the statute. There was no indirect motive shown. See *Poulsom v. Hirst*, L. R. 2 C. P. 449.

I do not consider the question raised as to whether, even if the action is otherwise well brought, any duty has been shown to have arisen from the defendant towards the plaintiffs.

On the whole, I think there must be judgment for the defendant, dismissing the action with costs, which I suppose under the statute means treble costs.

[QUEEN'S BENCH DIVISION.]

SPRATT ET AL. V. WILSON.

Trusts and trustees—Investment of moneys left to infants by will—Deposit in savings bank—Liability of trustee for legal interest—Acquiescence of statutory guardian of infants—Costs.

Where moneys are left by will to be invested at the discretion of the executor or trustee, the discretion so given cannot be exercised otherwise than according to law, and does not warrant an investment in personal securities or securities not sanctioned by the Court. And *Held*, that an executor and trustee who deposited funds so left in trust for infants, at three and a half or four per cent. interest, in a savings bank, did not conform to his duty ; and his failure to do so exposed him to pay the legal rate of interest for the money, although he acted innocently and honestly ; and the acquiescence of the statutory guardian of the infants, not being for their benefit, did not relieve him. *Held*, also, that the defendant was not entitled to costs out of the fund, but that he should be relieved from paying costs.

Statement.

THIS was an action brought by Charles Andrew Spratt and Richard James Spratt, grandchildren and legatees under the will of Catharine Philippo, deceased, against James Wilson, the surviving executor and trustee under the will. Richard Irwin, the other executor and trustee, died in 1885.

By her will Catharine Philippo bequeathed her real and personal estate to her executors and trustees upon trust to sell and convert into money, and to divide the net proceeds into three equal parts, and to stand possessed of one of such parts, and to invest in such securities as they should think fit, and to apply the interest arising from such investments to the maintenance, support, and education of the plaintiffs until they should attain the age of twenty-one years, and upon their attaining such age to pay to them the whole of the moneys so invested.

The defendant and Irwin accepted the trusts of the will, realized the estate, and allotted to the plaintiffs and retained for them the sum of \$1,100. After the death of Irwin the defendant continued to act as trustee, and retained possession of the fund.

The plaintiffs, after each had attained the age of twenty-
one years, brought this action, alleging that the trustees
did not invest the sum of \$1,100 as required by the will,
and that it had produced much less interest than it would
have done had it been properly invested; alleging also
that they had requested the defendant to pay over the
\$1,100 to them, but that he had neglected and refused to do
so, and claiming payment of the sum of \$1,100, an inquiry
as to what interest or profit would have been derived if the
fund had been properly invested, and payment of the
difference between the amount which should have been
derived and the amount paid over for the plaintiffs' main-
tenance.

The defendant set up in his statement of defence that
he had, in good faith, and with the approval of Andrew
Spratt, the grandfather of the plaintiffs, and their guardian
appointed by a Surrogate Court (their father and mother
being dead), entered into an arrangement for the deposit
of the \$1,100 in the savings bank department of a chartered
bank, and that the fund had been so deposited by the
defendant and Irwin, in his lifetime, and had remained there
at interest ever since. He also said that he was always
willing and had offered to pay over the fund and interest
to the plaintiffs, but they would not accept it.

The action came on for trial before BOYD, C., at Hamil-
ton on the 11th March, 1890.

The evidence shewed that the \$1,100 was deposited in
the savings bank department of a chartered bank, at three-
and a half and four per cent. interest, which disposition
of the money had been acquiesced in by the guardian of
the plaintiffs; and that the question between the parties
was only as to the payment of extra interest, and not as
to the principal or the interest accrued upon the money in
the bank.

The case was argued at the close of the evidence.

Bicknell, for the plaintiffs. The defendant is answer-
able for the interest he should have obtained by investing

Argument. the moneys : 2 W. & T. L. C., 6th ed., 996, 1014-5 ; *Bruere v. Pemberton*, 12 Ves. 386 ; Smith on Negligence, 2nd ed., 117-119. R. S. O. ch. 110, sec. 29, shews what investments are permissible. Upon the measure of damages I cite *Wightman v. Helliwell*, 13 Gr. at p. 343 ; *Inglis v. Beaty*, 2 A. R. 453 ; *Wiard v. Gable*, 8 Gr. 458 ; *Blogg v. Johnson*, L. R. 2 Ch. 225 ; *Small v. Eccles*, 12 Gr. 37. There was no acquiescence, because there was no full knowledge of rights, and the plaintiffs were minors. See Lewin on Trusts, 8th ed., p. 496. The acquiescence of the guardian could not operate as against the trusts of the will.

H. H. Robertson, for the defendant. No damages should be given against the defendant. There was no breach of trust ; the trust was to invest as the executors should think fit. There was a discretion to allow the principal to remain in the bank, and the guardian acquiesced in what was being done. I refer to *Beaton v. Boomer*, 2 Ch. Chamb. R. 89 ; *Re Brow*, 29 Ch. D. 889. The plaintiffs on coming of age ratified what was done by the executor : see *Huggins v. Law*, 14 A. R. 383. Even if interest is allowed, the executor should get his costs out of the fund. The breach of trust, if any, is an innocent one ; the defendant had filed his petition in the Surrogate Court and offered to account in the ordinary way. See Lewin on Trusts, 8th ed., p. 995 ; *Turner v. Hancoek*, 20 Ch. D. 303 ; *Sandford v. Porter*, 16 A. R. 565.

Bicknell, in reply. I refer on the question of acquiescence to *La Banque Jacques Cartier v. La Banque d'Epargne de Montreal*, 13 App. Cas. 111. As to the question of costs ; the defendant was not willing to pay over unless he got a release. See Lewin on Trusts, 8th ed., p. 358 ; Morgan on Costs, pp. 396-8, 405-6, 409 ; *Byrne v. Norcott*, 13 Beav. at p. 346.

March 14, 1890. BOYD, C. :—

The rule is well settled, where moneys are left by testamentary instrument to be invested at the discretion of the executor or trustee, that he is to invest in such securities

as are sanctioned by the Court. The general discretion so given does not warrant investment in personal securities, and it would be disregarding fixed standards of decision to lay it down that such a discretion can be exercised otherwise than according to law. In this case the executor (who became a trustee when the portion of the fund coming to the plaintiffs was apportioned for them) did not conform to his duty in depositing these funds at three and a-half or four per cent. in a savings bank. This failure to act as the law intends he should act exposes him to pay the legal rate of interest for this money, although he acted innocently and honestly. There is no misconduct on his part; but the question is a dry and hard one, whether he is to pay the difference in interest between three and a-half or four per cent. and six per cent. Had the matter been between adults, the evidence is ample to shew acquiescence, and I have had doubts whether the acquiescence of the statutory guardian of the infants is not enough to relieve the defendant from making good the extra interest. It is said that all the facts were not known to the plaintiffs and their guardian, so as to introduce the doctrine of acquiescence. But they knew that trust funds for them were in the keeping of the defendant and that he had deposited these funds in a savings bank and that the interest derived therefrom was remitted from time to time to the guardian, until they sent a request that the interest should be allowed to accumulate in the savings bank with the principal. They all, with the defendant, had common knowledge in law that this was not a proper investment; and all, in fact, were in common ignorance that it was not perfectly legitimate. But the better opinion is that the infants cannot acquiesce in a breach of trust; and the acquiescence of the guardian, not being for their benefit, ought not to operate against their right to recover the amount in dispute for the extra interest. That is in truth the whole dispute; because the defendant was prepared to pay over the principal and the accumulated interest as deposited in the savings bank.

Judgment.

Boyd, C.

Judgment.

Boyd, C.

The Registrar will compute the amount of interest at six per cent. (allowing six months from the time the fund was in the hands of the defendant as trustee at the lower rate) down to December of last year, the date the parties agreed on, giving credit for all sums paid, and allowing reasonable commission to the defendant in respect of this fund.

As the real question was merely about a small amount of extra interest, if I gave costs to the plaintiffs, it would be on the lower scale only. I cannot give costs out of the fund to the defendant, having regard to the decisions in *Re Radclyffe*, 29 W. R. 420, and *Bell v. Turner*, 47 L. J. Ch. 75, but following *Bate v. Hooper*, 5 DeG. M. & G. 344, I think this is a proper case (however viewed) to relieve the defendant from paying costs.

[CHANCERY DIVISION.]

RE CHAPMAN AND THE CORPORATION OF THE CITY OF
LONDON.

AND

RE CHAPMAN AND THE WATER COMMISSIONERS OF THE
CITY OF LONDON, AND THE CORPORATION OF THE
CITY OF LONDON.

Prohibition—Justices of the Peace—R. S. C. ch. 174, secs. 80, 140—Corporation—"Person" in R. S. C. ch. 1, sec. 7, sub-sec. 22.

A writ of prohibition may be issued to a justice of the peace to prohibit him from exercising a jurisdiction which he does not possess.

The word "person" in R. S. C. ch. 1, sec. 7, sub-sec. 22, includes any corporation "to whom the context can apply according to the law of that part of Canada to which such context extends," but as justices of the peace have not now and never had jurisdiction by the criminal procedure to hear charges of a criminal nature preferred against corporations : such word does not include corporations in cases where a justice of the peace is attempting to exercise such a jurisdiction.

A justice of the peace cannot compel a corporation to appear before him, nor can he bind them over to appear and answer to an indictment: and he has no jurisdiction to bind over the prosecutor or person who intends to present an indictment against them.

THIS was an application made on behalf of the above Statement.
named corporations for writs of prohibition to be directed to E. S. Jarvis, Esq., one of her Majesty's justices of the peace, in and for the county of Middlesex, and to one John Chapman, of the village of London West, the complainant in two informations laid by him before the said justice of the peace, charging the said the water commissioners for the city of London, and the said the corporation of the city of London, jointly, with having unlawfully and injuriously constructed across the river Thames, at a point about four miles from the said city of London, a certain dam, and the said dam unlawfully, obstinately and injuriously to have maintained in such an unlawful and injurious manner as to create and continue various public nuisances, &c., &c.

There were two cases argued together, and one judgment delivered in both.—REF.

Statement.

And also charging the said, the corporation of the city of London, with having also unlawfully and injuriously constructed across the said river, a certain dam, and the same unlawfully, obstinately and injuriously to have maintained, &c., so as to create and continue a great public nuisance, &c. And the grounds taken were :

(a) That the water commissioners for the city of London and the corporation of the city of London being, as they are in fact, both corporate bodies they are not subject to the provisions of the Criminal Procedure Act respecting proceedings against persons charged before a justice of the peace with an indictable offence, nor is there any power to summon the said corporations before him, nor to compel their attendance, and that in the absence of the said corporations the said justice had no jurisdiction to proceed *ex parte*.

(b) That there is no power for the justice to bind by recognizance the person presenting the information to prosecute or give evidence against the accused, unless a witness or witnesses were examined.

(c) That by the provisions of section 140 of the Criminal Procedure Act no bill of indictment for a nuisance, which is that which is charged against the said defendants, can be presented to or found by a grand jury, unless the defendants be committed for trial, or the prosecutor or other person presenting the indictment be bound by recognizance to prosecute or give evidence against the accused, or unless the indictment for such offence is preferred by the direction of the Attorney-General for the Province.

The motion was argued on March 17, 1890, before ROBERTSON, J.

J. B. Clarke, Q. C., for the motion. The magistrate has no jurisdiction to summon a corporation. He cannot commit them for trial, nor bind them over to appear. Corporations are not subject to the provisions of "The Criminal Procedure Act."

Hutchinson, contra. The magistrate has jurisdiction Argument. against all persons. "Person" includes corporations: R. S. C. ch. 1, sec. 7, sub-sec. 22. The prosecutor must be bound over under R. S. C. ch. 174, sec. 140, and the magistrate did not intend to proceed further than to do that.

Clarke, in reply. The justice could not bind over the prosecutor unless he could commit or admit to bail. I refer to *The Queen v. Herford*, 3 El. & El. 115; *Re Apple-dore*, 8 Q. B. at 149 Ref. d.; *Ex parte Higgins*, 10 Jur. 838; *The Duke of Devonshire v. Foott*, 5 Ir. R. Eq. 314; *Re Meyers v. Wonnacott*, 23 U. C. R. 611; *Regina v. The Local Government Board*, 10 Q. B. D. 309, at p. 321; Shortt, on Informations, Mandamus and Prohibition, 426, 432, 482.

March 19, 1890. ROBERTSON, J. :—(After stating the facts as above.)

The 140th section of the Criminal Procedure Act, R. S. C. ch. 174, enacts that no bill of indictment for *nuisance*, among other offences therein named, "shall be presented to or found by any grand jury, unless the prosecutor or other person presenting such indictment has been bound by recognizance to prosecute or give evidence against the person accused of such offence, or unless the person accused has been committed to or detained in custody, or has been bound by recognizance to appear to answer to an indictment to be preferred against him for such offence, or unless the indictment for such offence is preferred by the direction of the Attorney General or Solicitor-General for the Province, or by the direction or with the consent of a Court or Judge having jurisdiction to give such direction or try the offence."

By section 2 of the same Act, under the head of "Interpretation," the word or expression "person," has received no special meaning other than that conveyed by the word or expression in its ordinary sense; but by the general "Interpretation Act," 31 Vic. ch. 1 (R. S. C. ch. 1, sec. 7,

Judgment. sub-sec. 22), the expression "person," includes any body
Robertson, J. corporate and politic, or party, and the heirs, executors, administrators, or other legal representatives of such person, to whom the context can apply according to the law of that part of Canada to which such context extends."

And it is contended by Mr. Hutchinson, that this brings these several corporate bodies, within section 140, and that therefore the justice in these matters has jurisdiction to summon these corporations before him, and to make enquiry, as in ordinary cases in which the Criminal Procedure Act applies, and whether these corporations appear or not, before him, he may proceed with the investigation; and although he admits he cannot commit, or detain in custody, or bind them over by recognizance to appear to answer to an indictment to be preferred against them, or either of them, for such offence, he contends the said justice may bind by recognizance, the person laying the information, &c., to prosecute before the grand jury, or give evidence against the accused, of such offence.

It is also admitted by Mr. Hutchinson that until the Statute, 32 & 33 Vic. ch. 29, sec. 28, was passed a justice or justices of the peace had no jurisdiction to summon before him, or them, or to hear any complaint of whatever nature against a corporate body; but that by necessary intendment it must now be held that the jurisdiction has been increased so as to extend to such corporations.

I have duly considered the questions submitted, and I am of opinion that there is no force in the contention urged against prohibition. I cannot see that the law has been altered in any way so as to give a justice, or justices, of the peace jurisdiction in any matter which he, or they, did not have prior to the passing of the statute of 32 & 33 Vic. ch. 29, sec. 28. The reason for amending the procedure in criminal cases, in the direction now required by the enactment in question, was to prevent the abuse which had been practiced formerly by persons who were at liberty to prefer a bill of indictment against any other, before a grand jury, for any crime, without any previous enquiry,

before a justice of the peace, into the truth of the Judgment.
accusation.

Robertson, J.

Before the grand jury, the only evidence heard is that for the prosecution, and the accused is wholly unrepresented, and it frequently happened that persons entirely innocent of the charge made, and who had no notice that any proceedings were about to be instituted against him or them, found that a grand jury had been induced to find a true bill against him, and thus injure his character and put him to great expense and inconvenience in defending himself against a groundless accusation : Archbold's Criminal Pleading and Evidence, 19th ed. p. 5.

As to the Interpretation Act, it must be noted, that the expression "person" is to apply to corporate bodies, &c., "to whom the context can apply according to the law of that part of Canada to which such context extends."

Now the procedure in criminal cases never did give jurisdiction to justices of the peace, to hear charges of a criminal nature, preferred against corporate bodies. This procedure was by presentment by the grand jury, and an indictment following, which, until the passing of the statute 46 Vic. ch 34 (D) had to be moved up into the civil side by *certiorari* in order to compel the defendants to plead, &c. This is now done away with however by the last mentioned statute, which requires every corporation against which a bill of indictment for misdemeanor is found at any Court having criminal jurisdiction, to appear by attorney in the Court in which such indictment is found and plead or demur thereto (sec. 1) and the procedure is provided for by the 2nd, 3rd, 4th, and 5th secs. of that Act.

There is no hardship in the law as it now stands, because although sec. 140 declares that no bill of indictment shall be presented to or found by any grand jury unless, &c., as I have above set forth, yet the section goes on to say, "unless the indictment for such offence is preferred by the direction of the Attorney-General or Solicitor-General, &c., or by the direction or with the consent of a Court, &c."

Now, if this is a proper case to be brought before a

Judgment. grand jury, the Attorney-General no doubt will give the
Robertson, J. necessary direction therefor, or in case the party prosecuting, does not see fit to apply to him, the direction or consent of a Court or Judge having jurisdiction to give such direction, or to try the offence, can be applied to.

I am clearly of opinion that the Justice has no jurisdiction in this matter; he cannot compel the corporations, or either of them, to appear before him; should he summon them, they need not obey; should they not obey, he cannot issue a warrant to bring them, or either of them before him: although they and each of them are a corporate body, yet their "body" cannot be taken into custody, and the justice has no power to proceed *ex parte*. The accused must be before the Court when the testimony is given, and the procedure points out what is to be done when the accused does appear, &c. Nor can he, the justice, commit, or detain in custody, nor can he bind over to appear and answer to an indictment; that being so, he has no jurisdiction to bind over the prosecutor, or person who intends to present the indictment, &c.

Then as to the writ of prohibition; I think there is no doubt it can issue to a justice of the peace, to prohibit him from exercising a jurisdiction which he has not. In *The Queen v. Herford*, 3 El. & El. at p. 136, Cockburn, C. J., says: "I wish to add that we entertain no doubt but that a prohibition may issue to a Court exercising criminal jurisdiction as well as to a civil Court." The question here is: has the justice this particular jurisdiction? For the reasons given by me, I think he has not, and therefore the writs must go to prohibit him from further proceeding in the matters of these complaints. I do not think there should be any order as to costs.

G. A. B.

[CHANCERY DIVISION.]

SHAW ET AL. V. M'CREARY ET AL.

Husband and wife—Animals—Liability of wife of owner of animal feræ naturæ for escape from her separate property—Negligence.

A bear belonging to one of the defendants escaped from premises, the separate property of his wife, the other defendant, where it had been confined by him without objection from her, and attacked and injured the plaintiff on a public street :—

Held, that the wife having under R. S. O. ch. 132, secs. 3 and 14, all the rights of a *feme sole* in respect of her separate property, might have had the bear removed therefrom, and not having done so she was liable to the plaintiff for the injury complained of.

The principle of *Fletcher v. Rylands*, L. R. 1 Ex. 282, L. R. 3 H. L. 330, applied.

THIS was an action brought by John Shaw, an infant, Statement.
by Matthew Shaw, his father, as his next friend, and the said Matthew Shaw against John McCreary and Mary McCreary for damages caused by a bear owned by John McCreary and kept on the premises of Mary McCreary, getting out on the public street and attacking and injuring the plaintiff John Shaw.

The action was tried at the Toronto Winter Assizes on January 16th, 1889, before Sir Thomas Galt, C. J. C. P., and a jury.

R. L. Fraser, for the plaintiffs.

Mulock, Q. C., for defendant Mary McCreary.

W. N. Miller, Q. C., for defendant John McCreary.

The evidence shewed that the defendants were husband and wife, and that the husband had brought the bear to the premises where she and her husband resided, they being owned by the wife as her separate estate; that the bear being so kept there, without objection on the part of the wife, had escaped to the street and had attacked and thrown down and severely bitten the plaintiff John Shaw.

The learned Chief Justice charged the jury after reviewing the facts, as follows: "Under the circumstances I think the

Statement. defendant McCreary is responsible. The action is brought against him and his wife on the ground that the wife owned the property, and Mr. Fraser pressed me very strongly with the argument that the owner of the property is responsible for anything that takes place on that property, at least for allowing a ferocious animal to be on it. That may be so in ordinary cases, but in my opinion, considering that the owner of the property in this case and John McCreary were husband and wife, I do not think the wife is obliged to disobey the positive injunctions or wishes of her husband. That leaves it, in my opinion, that the responsibility rests on him. * * I do not submit any question to you except with regard to the damages because the plaintiff is entitled to recover. * *

The Chief Justice dismissed the action as against the wife.

The jury brought in a verdict in favour of Matthew Shaw for \$200, and in favour of John Shaw for \$200 against the defendant John McCreary.

The Chief Justice made the following endorsement on the record.

"I dismiss the action against Mrs. McCreary with costs, such costs to be confined to the counsel fee at the trial. The jury assess the damages of Matthew Shaw at the sum of two hundred dollars, and the jury assess the damages of John Shaw at the sum of two hundred dollars."

From this judgment the plaintiffs appealed to the Divisional Court on the ground that they were entitled to recover against the wife Mary McCreary, as well as the husband, and the appeal was argued on February 25th, 1890, before BOYD, C., and FERGUSON, J.

R. L. Fraser for the appeal. The learned trial Judge, was wrong in holding that the wife was not liable for the damage done by the bear, she having allowed it to be kept on her premises, from which it escaped. Her husband could not compel her to permit its being kept there. She

had the right to have it sent away and should have exercised that right. On the contrary, the evidence shews it was kept there with her concurrence and that she fed it there. She could have compelled the husband by injunction to remove the bear, and if she could, and did not, then she must be held responsible for any damage which may result from her neglect. The fact of their living together can make no difference; it does not affect her proprietary rights or liabilities: R. S. O. ch. 132, s. 14. The wife's right of volition cannot be controlled by her husband to the extent of compelling her to keep animals *feræ naturæ* on her property. I refer to *Weldon v. DeBathe*, 14 Q. B. D. 339; *Symonds v. Hallett*, 24 Ch. D. 346; *Wood v. Wood*, 19 W. R. 1049; *Allen v. Walker*, L. R. 5 Ex. 187; *Donnelly v. Donnelly*, 9 O. R. 673; *Till v. Till*, 15 O. R. 133; *Everslie on Domestic Relations*, 403.

W. N. Miller, Q.C., for Mary McCreary, contra. The evidence shews that the wife did not object to the presence of the bear, as the husband was a man of strong will accustomed to have his own way. The wife is not liable, because she did not own the bear or have charge of or any control over it. No case goes so far as to shew that a husband has not the right to live with his wife in her house, and so doing he has dominion over her: *Schouler on Husband and Wife*, § 135; *Schouler on Domestic Relations*, § 75. The wife has committed no tort and anything she did do, which was merely permissive, was done under her husband's dominion and control. As to the keeping of the animal I refer to *Smith on Negligence*, Bl. ed. 90; *Pollock on Torts*, Bl. ed. 316; *Rylands v. Fletcher*, L. R. 3 H. L. 330.

Fraser in reply.

March 8th, 1890. BOYD, C.:—

This case should not have been withdrawn from the jury as to the liability of the defendant Mary McCreary to answer for the injury sustained by the plaintiff. The

Judgment.

Boyd, C.

learned Chief Justice ruled that as the husband put the bear upon the wife's property whence it broke loose and did the injury she was not responsible, because it was her duty to yield to the wishes of her husband.

Apart from the relationship of husband and wife both defendants would be liable, the one as owner and the other as keeper or custodian of the wild animal. In one of the most recent cases I have seen, Huddleston, B., sums up the law substantially thus: If persons choose to keep wild and savage animals (such as a bear, a tiger or a lion,) they do so at their own risk and peril, and if any such animal cause injury to anybody they would be liable for the injuries, and this without notice beyond what the law imports of their savage disposition: *Wyatt v. The Rosher-ville Gardens Co.* 2 Times L. R. 282 (February, 1886).

And in a case very much like this where a bear was in question with an alleged reputation for docility and playfulness, Crowder, J., in *Besozzi v. Harris*, 1 F. & F. 92, (1858), ruled that a person keeping an animal of a fierce nature is bound so to keep it that it shall not commit injury. It does not matter, he said, that the bear appears to be tame and docile, for every one must know that such animals are of a savage nature, and though that nature may sleep for a time it may wake up at any time. An interesting case discussing the liability of owner and keeper is to be found in *Cowan v. Dalziel*, 5 Ct. of Sess. 4th, Series 241.

The responsibility of keepers (who are not owners) is laid down in a case to which constant reference is made as authority on this head of law of *M'Kone v. Wood*, 5 C. & P. 1. It is there said that harbouring the animal about one's premises or allowing him to be or resort there is a sufficient keeping to support this form of action.

Apart from any legislation a married woman may be liable for torts committed by her unless she has been acting under the coercion of her husband, and the evidence falls far short of shewing any such state of facts here as to the husband: *Vine v. Saunders*, 4 Bing. N. C. 96; *Hyde v. S—*, 12 Mod. 246; *Handy v. Foley*, 121 Mass. 259.

Now the Ontario Statute R. S. O. ch. 132, secs. 3, 14, gives a married woman all the rights of a *feme sole* in respect of her separate property as against all the world, including her husband. The property on which the bear was kept was the separate estate of the defendant Mary McCreary, and she had the power to consent to its being harboured there or to have it removed therefrom. As to this property she had all the rights of a stranger in this regard as against her husband. If she wished to escape the liability which attaches to the keeper of wild animals her duty was (as said in the case 5 C. & P.) either to have the bear destroyed or to have it sent away. She chose to gratify her husband, and commendable as this may be, it will not and ought not to exculpate her for allowing things dangerous and mischievous to break from her premises to the injury of her neighbours and those lawfully using the public streets. Had she stored water on her land and it had broken forth to the detriment of others she would be liable under the principle of *Fletcher v. Rylands, infra*, and the risk undertaken in keeping wild animals has been put on a similar footing. See per Blackburn, J., in *Fletcher v. Rylands*, L. R. 1 Ex. 282, approved in House of Lords, L. R. 3 H. L. 330.

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Boyd, C.

The result is in my opinion that the case should be sent down for further trial as to the wife unless consent is now given to let the present verdict include both, with all costs of action.

FERGUSON, J.:—

It is stated in Addison on Torts that the mere keeping of an animal of a fierce nature such as a tiger or a bear or a dog, known to be wont to bite, is unlawful, and therefore if any person is bitten or injured by such an animal an action is maintainable against the person who keeps it. In the case *Cox v. Burbidge*, 13 C. B. N. S., at 439, Willes, J., says: "The distinction is clear between animals of a fierce nature, and animals of a mild nature which do

Judgment. not ordinarily do mischief like that in question. As to the
Ferguson, J. former, if a man chooses to keep them, he must take care to keep them under proper control, and, if he fails to do so, *he is taken to know their propensities*, and is held answerable for any damage that may be done by them before they escape from him and return to their natural state of liberty. As to animals that are not naturally of a mischievous disposition, the owner is not responsible for injuries of a personal nature done by them, unless they are shown to have acquired some vicious or mischievous habit or propensity, and the owner is shown to have been aware of the fact. If the animal has such vicious propensity and the owner knows of it, he is bound to take such care as he would of an animal which is ferœ naturœ, because it forms an exception to its class."

All the authority that I have seen is in harmony with this statement of the law, and I think there can be no reasonable doubt that the owner of the animal in the present case against whom the verdict is is liable to the plaintiff in damages for the injuries done to the plaintiff.

M'Kone v. Wood, 5 C. & P. p. 1, was an action against a party for keeping a vicious dog, in which Lord Tenterden said: "It is not material whether the defendant was the owner of the dog or not; if he kept it, that is sufficient; and the harboring a dog about one's premises, or allowing him to be or resort there, is a sufficient keeping of the dog to support this form of action. It was the defendant's duty either to have destroyed the dog, or to have sent him away, as soon as he found that he was mischievous." It seems clear that the law so stated is as applicable to the case of an animal of a fierce nature (as in the present case) as where the animal is not naturally of a mischievous disposition but has become an exception to its class in the way above mentioned, and if so the keeping or harboring of the animal about one's premises or allowing him to resort there would be sufficient to render the person so doing liable as if he were really the owner of the beast.

The two defendants are husband and wife. The hus-

band was the owner of the bear who did the mischief, and his liability is scarcely if at all disputed. The premises on which the bear was kept, it is admitted, is the separate property of the wife, and it is also undisputed that she was at the time of the injuries to the plaintiff carrying on a business thereon separate from any business done or carried on by her husband. This property, according to the statutes applicable to the case, she might have, hold and enjoy free from her husband's control as if she were sole and unmarried, and it appears that she was in fact enjoying the property much in this way. Judgment.
Ferguson, J.

At common law a married woman was liable for her torts, and so far as I can see the married woman's property Acts do not make her any less so.

The authorities referred to in the case *Vine v. Saunders*, 4 Bing. N. C. 96, and the other cases referred to by the Chancellor seem to shew this, and see Pollock on Torts, pp. 49 and 50.

The case of her being coerced by her husband may be an exception to this, but there is not evidence sufficient to shew that the female defendant was so coerced in the present case, and I fail to see why the case as to her should have been withdrawn from the jury.

I agree in the disposition of the motion made by the judgment of the Chancellor.

G. A. B.

[CHANCERY DIVISION.]

BARBER ET AL. v. MCKAY ET AL.

Registry laws—Registration of subsequent deed—Priority—Proof of valuable consideration.

Registration of a subsequent deed will not give priority over another unregistered deed from the same grantor, prior in point of time, unless a valuable consideration for the former is proved. Mere production or registration of the instrument by the party claiming under it is not sufficient proof for this purpose.

Statement.

THIS was an appeal from the judgment of FALCONBRIDGE, J., in an action of ejectment brought by Frederick W. Barber and Walter M. Barber, against Mary Ann McKay and John McKay.

The action had been previously tried before ROSE, J., and an appeal had to the Divisional Court, as reported in 17 O. R. 562, when a new trial was ordered.

The second trial took place at Milton on 5th November, 1889, before FALCONBRIDGE, J., without a jury, when judgment was reserved but subsequently given for the plaintiffs.

Shilton, for plaintiffs.

Laidlaw, Q. C., for defendant Mary Ann McKay.

D. McGibbon, for defendant John McKay.

The plaintiffs were executors of one Joseph Barber, and claimed through a deed to their testator from one James Barber, as executor of Margaret Smeltzer, dated February 16th, 1877, but not registered until April 15th, 1887, and the defendant Mary Ann McKay who, with her children, was in possession, claimed under a deed from the same James Barber to her former husband Robert Harwood,* dated September 19th, 1873, which deed was proved at this trial but had never been registered.

* Robert Harwood had died intestate in November, 1873, in possession, leaving his wife Mary Ann and four children in possession, and she had afterwards married the defendant John McKay.—R.E.P.

The plaintiffs proved the will of Margaret Smeltzer, ^{Statement.} referred to in 17 O. R. 562, and the deed from James Barber to Joseph Barber, their testator, and its registration, but did not give any evidence that it was made for valuable consideration. The evidence shewed that Harwood and his wife had gone into possession when the deed was made to him, and had remained in possession until he died in November, 1873, and that the wife and children had been in possession ever since, with the exception of a year, about 1879 or 1880, when she went away with her second husband, John McKay, to look for work, when Joseph Barber collected rent from a tenant, whom he let into possession ; but on her return she immediately resumed possession.

From this judgment the defendant, Mary Ann McKay, appealed to the Divisional Court, and the appeal was argued on February 25th, 1890, before BOYD, C., and FERGUSON, J.

Bain, Q. C., for the appeal. The plaintiffs have not proved title in their testator. The deed to Harwood which is now proved, passed the estate in the land to him. No title passed by the deed to the plaintiffs' testator, Joseph Barber, and the prior registration of this latter deed will not prevail against the defendant so as to defeat her title under the deed to Harwood, and the possession from 1873 under it. [BOYD, C. : What is the consideration in the deed under which plaintiffs claim ?] \$450, but no proof of its payment was given. The defendants have title by deed and possession. To give their deed priority the plaintiffs must prove that the deed to Harwood was voluntary, and the deed to Joseph Barber was for value. Priority of registration under R. S. O. ch. 114, sec. 82, cannot avail here as against the possessory title, even if there was no notice of the deed to Harwood. The plaintiffs claim a break of a year in the defendant's possession, but Joseph Barber was a trespasser then for we had

Argument. a title by deed and he had none. [BOYD, C. : But if he had registered his deed would he not have cut defendant out ?] Not unless he proved value given and want of notice. Even if registration of his deed could affect the defendant, she had fourteen years' possession, and can set it up against the registered instrument. Registration of a subsequent deed is not sufficient to give priority without proof of valuable consideration : *Doe d. Cronk &c. v. Smith*, 7 U. C. R. 376 ; *McKenny v. Arner*, 8 C. P. 46 ; *Leech v. Leech*, 24 U.C.R. 321. [BOYD, C. : Was there any evidence that the first deed was a part of any scheme ?] No, on the contrary, Harwood got possession with his deed. Even if his deed was fraudulent and void under R. S. O. ch. 114, sec. 76, the defendant has title by possession.

W. T. Allan, contra. When defendants resumed possession after the break they did not go in under the deed but as trespassers. [BOYD, C. : Why ?] The plaintiffs' testator's deed was then in existence, and when registered it related back to its date in 1877. The evidence disproves title by possession. [BOYD, C. : What about the evidence of a valuable consideration in that deed ?] That evidence was not given, and as so many of the parties are now dead, perhaps it could not be given. Valuable consideration must be presumed in favour of the plaintiffs under R. S. O. ch. 114, sec. 57, and ch. 61, ss. 44 and 45.

Bain, Q.C., in reply.

March 8, 1890. BOYD, C. :—

Where priority is sought under the Registry Act for a conveyance subsequent in date to one earlier in date, it is essential that proof of valuable consideration should be given. For this purpose the mere production or registration of the instrument is not enough and no inference to this effect can be reasonably drawn from the provisions referred to by the plaintiff: sec. 57 of the Registry Act, R. S. O. ch. 114, and secs. 44 and 45 of the Evidence Act R. S. O. ch. 61. In some cases the legislature has

relaxed this rule, as in the case of defence of purchaser for value R. S. O. ch. 100, sec. 36, and in case of a subsequent purchaser ch. 100, sec. 6. Judgment.
Boyd, C.

The *Canada Permanent Loan and Savings Company v. Page*, 30 C. P. 1, does not carry the matter beyond the language of the statute that the duplicate instrument with certificate of registry was sufficient evidence of its execution. The deed relied upon by the plaintiff as giving him priority by virtue of its prior registration is expressed to be for \$450, and was put in by himself; had it been called for and put in by the defendant the plaintiff might have invoked *Bondy v. Fox*, 29 U. C. R. 64, as dispensing with further proof of value.

But as the case stands it is governed by the law laid down in early decisions under the Registry Acts, which are still applicable. Where plaintiff and defendant each claimed under deeds from the same quarter, it was held that the deed prior in date prevailed over a deed prior in registration, the latter not being proved to be for a valuable consideration: *McKenny v. Arner*, 8 C. P. 46.

There is no evidence of value as against a stranger, from the fact that the deed put in evidence by the plaintiff appears to be for \$450, and has the usual receipt thereon. This was laid down in *Doe d. Cronk, etc. v. Smith*, 7 U. C. R. 376, a case that has always been followed: *Blackburn v. Gummerson*, 8 Gr. at p. 334.

The plaintiff here fails, because relying upon the registry laws to give priority to the deed under which he claims he has failed to prove the consideration, and it is not suggested that the difficulty could be remedied by opening up the matter for further trial.

The defendant and children were in possession from 1873 till 1879 by virtue of a conveyance to her husband in 1873 from the then owner. Possession was then had for about a year by the holder of a subsequent conveyance from the same owner made in 1877. This ended, however, on the return of the defendant, who resumed possession and has since lived upon the lot in question.

Judgment.

Boyd, C.

The plaintiffs claim under the deed of 1877, which being for the first time registered in 1887, is said to have avoided the earlier conveyance, which has never been registered. It is not needful to consider this aspect of the case, though a good deal may be said in favour of the defendants' contention that the late registry did not give priority to the plaintiff, having regard to the observations of Sherwood, J., in *Rogers v. Barnum*, 5 O. S. at p. 261.

But the judgment may rest on the other ground that the deed as registered is not by the plaintiffs proved to be for value.

Judgment will be entered accordingly with all costs of litigation.

FERGUSON, J., concurred.

G. A. B

MEM.—In the head-note of the report of this case, 17 O. R. 562, the words “no notice having been given under R. S. O. 1887, ch. 61, sec. 33,” in the fifth and sixth lines, should be struck out.

[QUEEN'S BENCH DIVISION.]

RE DERBY AND THE LOCAL BOARD OF HEALTH OF SOUTH PLANTAGENET.

*Municipal corporations—Public Health Act, R. S. O. ch. 205, sec. 49—
Payment for services of physician—Judgment against local board of
health as a corporation—Order upon treasurer of municipality—
Mandamus.*

Section 49 of the Public Health Act, R.S.O. ch. 205, provides that "The treasurer of the municipality shall forthwith upon demand pay out of any moneys of the municipality in his hands the amount of any order given by the members of the local board, or any two of them, for services performed under their direction by virtue of this Act."

A physician recovered judgment in a Division Court against a township local board of health, sued as a corporation, for services performed in a small-pox epidemic.

It appeared that the physician had been appointed medical health officer of the municipality by the council, but that before suing the board he had brought an action against the municipal corporation for his services, in which he failed.

Upon motion by the physician for a mandamus under sec. 49 to compel the members of the board to sign an order upon the treasurer of the municipality for the amount of the judgment recovered :—

Held, that, although it might be difficult to conclude that a board of health is constituted a corporation by the Act, yet the judgment of the Division Court practically decided that this board might be sued as such, and, not being in any way impeached, it could not be treated as a nullity. As there appeared to be no other remedy, the applicant was entitled to the mandamus.

THIS was an application by W. J. Derby for an order in *Statement*. the nature of a mandamus ordering John Moffatt and others, described as the members of the local board of health of the municipal corporation of the township of South Plantagenet, to grant an order to the applicant on the treasurer of the township for payment to him of the sum of \$89.10, being the amount of a certain Division Court judgment obtained by the applicant against the local board of health of the township.

The affidavits filed in support of the motion shewed that at the date of the motion the persons constituting the local board of health of the township were Narcisse Parent, the reeve, Alexander McLean, the clerk, who were *ex officio* members of the board under R. S. O. ch. 205, sec. 39, sub-sec. 1, and John Moffatt, William Franklin, and Douthe

Statement.

Sabourin, the members appointed by the township council; that the last three named persons were first appointed in February, 1885, and had been annually re-appointed since; that the applicant, W. J. Derby, was a physician who had been appointed medical health officer of the township by the township council in April, 1886, but without any special resolution with regard to salary or remuneration; that shortly afterwards he had performed the services for which he claimed to be paid, the principal part of his claim being a sum of \$75 for services rendered to one Reid, while he was suffering from small-pox; that he had brought an action in the Division Court against the municipal corporation to recover the amount from them, and that judgment had been given against him; that he then brought an action in the Division Court against Reid and the local board of health of the township to recover the amount, the board being sued as a corporation; that Reid appeared at the trial of the action, as did also the local board of health, and that the action was dismissed as against Reid, but was successful against the local board of health, against whom, as a corporation, he recovered judgment for \$75 and costs; that they had no property out of which he could levy the amount, and that his only means of recovering the amount of his judgment was by a mandamus compelling the members of the board, or any two of them, to give him an order on the township treasurer, under the provisions of sec. 49 of ch. 205, R. S. O.

The only affidavit filed on behalf of the members of the board was by Alexander McLean, who stated that the services rendered by Dr. Derby were at the request of the patient Reid, and not otherwise, and that he was well able to pay the plaintiff for all such services; that Reid's family were isolated by order of the board of health, and a man placed in charge to prevent outside communication, and that this man was paid by the municipality; and that the municipality denied all liability for the applicant's claim, and insisted that the applicant was concluded by the judgment already given in their favour.

The motion was argued before MACMAHON, J., in *Argument*.
Chambers, on the 14th May, 1889.

Shepley, for the motion.

Aylesworth, contra.

September 14, 1889. MACMAHON, J.—(after stating the facts.):—

The simple question is, as the plaintiff has recovered a judgment against the local board of health, whether he is entitled to have a mandamus issued commanding the local board to make an order on the treasurer of the municipality for the amount of such judgment.

Under sec. 49 of ch. 205, R. S. O., the treasurer of the municipality shall forthwith upon demand pay out of any moneys of the municipality in his hands the amount of any order given by the members of the local board, or any two of them, for services performed under their direction. So that the only manner in which payment can be obtained for services performed is by an order on the township treasurer.

By sec. 53, when the local board of health has authority to direct anything to be done by any person or corporation, in default of its being done by the person, the local board may direct that such thing shall be done at the expense of the person in default, and may recover the expense thereof with costs by action or distress; and, in case of non-payment thereof, the same shall be recovered in like manner as municipal taxes.

By sec. 62 all reasonable costs and expenses incurred in abating a nuisance shall be recovered by the municipal council or local board of health under ordinary process of law.

The several provisions of the Public Health Act to which I have referred shew that local boards of health are empowered to sue.

Judgment.
MacMahon,
J.

The judgment stands against the local board, and I must assume that it was recovered against them in consequence of services rendered by the plaintiff in his capacity of medical health officer under the directions of the local board; and the only way in which the plaintiff can claim any benefit from the judgment is by obtaining from the local board of health an order on the township treasurer for payment of the same.

The difficulty which presented itself to me was, in consequence of the medical health officer being the appointee of the municipal council under the 47th section of the Public Health Act, and the plaintiff having been so appointed, and having failed in his action against the authority appointing him, for the very same cause of action that he was successful in against the board of health, whether the municipality could be made liable under the circumstances through the action of the local board of health.

There is a somewhat similar provision to that contained in the 49th section of ch. 205, R. S. O., for payment by the township treasurer on the order of the local board of health, to be found in the Imperial Act 1 & 2 Vic. ch. 14, sec. 2. Under the latter Act, where any person is apprehended under circumstances denoting a derangement of mind, it shall be lawful for two justices of the peace for the said county to ascertain by the best legal evidence that can be procured, under the circumstances, of the personal legal disability of such insane person, the place of the last legal settlement of such person, and to make an order on the overseers of the parish where they adjudge him to be settled, for the costs of examining and conveying him to the asylum, and of his maintenance in the asylum, and where such place of settlement cannot be ascertained, such order shall be made on the treasurer of the county, &c., where such person shall have been apprehended. An appeal is given by section 3 of that Act to the overseers of the parish in which the justices shall adjudge any such insane person to be settled. But I suppose, notwithstanding the right of the parish to appeal, that the

justices could, in the event of their refusal to do so, be compelled by mandamus to make an order on the overseer or treasurer of the county for the costs of examining such person and conveying him to the asylum: *Regina v. The Clerk of the Peace of West Yorkshire*, 20 L. J. M. C. 18.

Judgment.
MacMahon,
J.

In *Regina v. Commissioners of Sewers for Norfolk*, 15 Q. B. 549, it appeared that a bill was introduced into Parliament for the purpose of more effectually draining a particular level; the defendants *bonâ fide* and with discretion caused their clerk to take all reasonable and necessary steps for opposing the bill in Parliament and to prevent its passing, and thereby a considerable amount of costs and expenses were incurred and remained due to the clerk, who had since died. It was held, notwithstanding the commissioners might not be compellable by mandamus to oppose such bill, that the legal representatives of the clerk were entitled to a mandamus directing the commissioners to levy a rate on the land within their jurisdiction under the 4 & 5 Vic. ch. 45, and to pay off the amount due for the costs and expenses.

See also *Re Western Fair Association v. Hutchinson*, 12 P. R. 40; *Re Macfie v. Hutchison*, *ib.* at pp. 177-9.

The order for the mandamus must go directing the members of the board of health for the township of South Plantagenet, or any two of them, to make an order in favour of the plaintiff on the township treasurer of the said township for the payment by him to the plaintiff of the sum of \$89.55, being the amount of the judgment debt and costs recovered against the said local board of health.

The plaintiff is, I think, entitled to the costs of the motion.

John Moffatt and the other members of the board named in the order appealed against this decision, and their appeal was argued before a Divisional Court (ARMOUR, C. J., and STREET, J.) on the 26th November, 1889.

Aylesworth, for the appellants. A local board of health is not a corporate body. Sec. 49 of the Public Health Act casts no statutory duty on the appellants to grant the

Argument.

respondent an order on the municipality. Such a duty is nowhere cast upon them, unless inferentially. The members of such a board may sign an order for their own protection, to avoid a personal liability, but they are not obliged to sign. The error of Dr. Derby was in suing a nonentity. He first sued the township and failed, and then conceived the idea of taking this proceeding. What he could not obtain directly he should not be allowed to obtain indirectly. There is a statutory duty upon school trustees to give orders upon the municipality, and therefore the cases with regard to them are of no assistance. The only cases at all applicable are *Re Commercial Bank and London Gas Co.*, 20 U.C.R. 233, and *Re McDougall and Lobo*, 21 U.C.R. 80.

Shepley, for W. J. Derby, the respondent. There is abundant internal evidence in the statute that a local board of health may sue and be sued as a body corporate: sec. 53, and other sections referred to by Mr. Justice MacMahon. But, however that may be, that was a question for the Division Court, and it has been determined in that Court; there is no appeal; and prohibition would not lie. The judgment of the Division Court assists us; it establishes that the local board of health has a corporate capacity, and owes the respondent a debt; it enables us to answer *res judicata* to my learned friend's argument. We are directly within *Regina v. Commissioners of Sewers for Norfolk*, 15 Q. B. 549, and the other cases cited by the learned Judge. If the board can do all the things mentioned in the statute, they can incur a debt.

Aylesworth, in reply, cited *Scott v. Burgess*, 19 U. C. R. 28; 21 C. P. 398.

March 8, 1890. The judgment of the Court was delivered by

STREET, J. :—

The appellant has recovered judgment for the amount of his claim against the local board of health, who were sued in the Division Court, and who there defended the action

as a corporation. It is argued before us that no such corporation is created by the Act, and that therefore there is no foundation for this application for a mandamus, no debt having been proved to be due by the individual members of the board. We should perhaps have some difficulty in coming to the conclusion that the local board of health for each municipality is constituted a corporation by the Act ; but we find here a judgment by a Court of competent jurisdiction, not in any way impeached, practically deciding that this local board of health may be sued as a corporation. We have no power upon this application to declare that judgment a nullity ; and if we were now to refuse to treat it as valid, and refer the appellant back to his action against the individual members of the board, we should be refusing him a remedy of any kind for a claim which the Division Court has held him justly entitled to recover. If he were to be told that he must sue the individual members of the board in the Division Court, he would naturally be met by the objection there that his claim had been already turned into a judgment against the corporation, and that he could not recover against the individuals also. We must, therefore, treat this judgment as sufficiently establishing against the local board of health a debt which they are bound to pay ; and as the only method of enabling the applicant to recover his debt appears to be by the mandamus asked for, we think it should go directing all the members of the board of health to sign the order asked for : it will not be necessary that more than two of them should actually sign it, but all are compellable to do so.

The applicant should have his costs of the motion in the Divisional Court as well as those of the original application.

Judgment.

Street, J.

[CHANCERY DIVISION.]

ANDERSON ET AL. V. HANNA ET AL.

Statute of Limitations—Lands—Heirs-at-law—Tenant by curtesy of equitable estate—Redemption judgment—Mortgage—Power of sale.

In an action for redemption and possession against a mortgagee by the tenant by the curtesy and the heirs of a deceased mortgagor who were infants when possession was taken by the mortgagee, it appeared that the right of the tenant by the curtesy had been barred by the statute as against the mortgagee, but that of the heirs had not :—

Held, that the heirs were entitled to redeem subject to the right of the mortgagee and those claiming under him to hold possession during the life of the tenant by the curtesy whose estate had by virtue of the statute become vested in the mortgagee.

Proper judgment where in such circumstances the heirs-at-law take proceedings for redemption of the lands during the life of the tenant by the curtesy.

Statement.

THIS was an action for the redemption of certain lands. The statement of claim set out that the plaintiff, James Anderson, was the surviving husband of Ellen Anderson, who died intestate, at Toronto, in the year 1874, and that the other plaintiffs were the surviving children and heirs-at-law of the said Ellen Anderson: that at the time of her death the said Ellen Anderson was seized in fee of or was otherwise well entitled to an estate of inheritance in certain lands in the city of Toronto, subject only to a mortgage, dated the 10th of August, 1874, made by the plaintiff, James Anderson, to Isaac Abbott, and expressed to secure \$200 and interest: that shortly after the death of his said wife the plaintiff, James Anderson, who was entitled to a life estate as tenant by the curtesy in the said lands, went to live in the United States of America, taking with him the other plaintiffs, his children, who were then minors: that the said mortgage, together with the said mortgaged premises and mortgage debt, was subsequently assigned by the said Abbott to one Margaret Brown who assigned the same to one John Clarence Gray, and on or about the 19th day of January, A.D. 1877, the said John Clarence Gray, professing to act under the power of sale in the said mortgage, executed a conveyance of the said land

and premises to the defendant, Hanna: that the lands had Statement.
subsequently, by sale and mortgage, passed into the hands
of various parties now among the defendants to this action :
that the defendants, or some of them, during their occu-
pancy of the said premises had committed great waste and
destruction upon the same by pulling down and removing
therefrom a certain dwelling house, and by suffering the
buildings upon the said premises to become greatly dilapi-
dated, and the plaintiffs charged that the said defendants
were liable to the plaintiffs for the said waste and dilapi-
dation; and that the damages they, the plaintiffs, had
sustained by reason of the said waste and dilapidation of
the said mortgaged premises ought to be charged against
the defendants in taking their accounts as mortgagees in
possession under the said mortgage made by the plaintiff
Anderson, as aforesaid, and that the defendants were also
chargeable with large sums for rents of the said premises
which they might have received but for their wilful neglect
and default: that the defendants refused to allow the
plaintiffs to redeem, and refused to reconvey the said
mortgaged premises: that they, the plaintiffs, claimed to
be entitled to redeem the said land, and upon payment of
the amount due, if anything, upon the said mortgage made
by the plaintiff, Anderson, to obtain a reconveyance and
the possession thereof. The plaintiffs therefore claimed to
be let in to redeem the said mortgaged property, and that
an account might be taken, with yearly rests, of rents and
profits of the premises comprised in the said mortgage
made by the plaintiff Anderson, received by the mortgagee,
the said Isaac Abbott, or anyone claiming through or under
him, or by the defendants, or by any other person for his
or their use, or which without his or their wilful neglect
and default might have been so received: that an enquiry
might be made whether the said mortgaged premises had
become depreciated by reason of the waste and dilapidation
aforesaid to any and to what extent, and that what should
appear due to the plaintiffs in respect of such dilapidation
might be set off against the amount which might be found

Statement.

due to the defendants for principal, interest, and costs, and that the balance, if any, in favour of the plaintiffs, might be ordered to be paid by the defendants to the plaintiffs.

The defendants, amongst other defences, relied upon the Statute of Limitations, R. S. O. 1887, chap. 111.

The remaining facts of the case sufficiently appear from the judgment.

The action came on for trial before ROBERTSON, J., on April 16th and 17th, 1889, at Toronto.

J. H. Ferguson and *O'Brien* for the plaintiffs. The defendants derive title from an assignee of the power of sale, and *Re Gilchrist and Island*, 11 O. R. 537, is decisive. They referred to *Faulds v. Harper*, 2 O. R. 405, 9 A. R. 537, 11 S. C. R. 639.

Reeve, Q. C., and *Mills* for the defendants Hanna and Kerr. As to the power of sale not extending to an assignee, see *Re Coath and Wright*, 8 C. L. T. 10; *Grant v. Canada Life Assurance Company*, 29 Gr. 256; *Boyd v. Petrie*, L. R. 7 Ch. 385; *Warner v. Jacob*, 20 Ch. D. 220. As to the Statute of Limitations, Anderson is barred, and the children are not entitled until after his death. If the sale under the power of sale is not upheld, then the Statute of Limitations is a complete defence: R. S. O. 1887, ch. 111, sec. 19; *Faulds v. Harper*, 2 O. R. 405; *Kinsman v. Rouse*, 17 Ch. D. 104; *Forster v. Patterson*, 17 Ch. D. 132; *Bright v. McMurray*, 1 O. R. 172. These defendants are in as good a position as the mortgagee in possession, and as to improvements and rents and profits, they are in a better position: *Parkinson v. Hanbury*, 2 H. L. Cas. 1; *Carroll v. Robertson*, 15 Gr. 183; *Skae v. Chapman*, 21 Gr. 534; Fisher on Mortgages, 3rd ed. Vol. 1, p. 492; Coote on Mortgages, 4th ed. sec. 659.

Ross for the defendants Fitch and the Western Canada Loan and Saving Company.

Ferguson in reply. Hanna was the assignee of the mortgage debt, but went into possession as owner claiming under the deed from the mortgagee, and as the latter was

never in possession, he is not in a position to say he is a mortgagee in possession. I refer also to *Re Taylor*, 8 P.R. 207, as to the statute not applying. If a party goes into possession of lands owned by an infant, he holds as bailiff or tenant of the infant, and the Statute of Limitations does not run. Argument.

June 8th, 1889. ROBERTSON, J.:—

Action commenced on June 22nd, 1888. Ellen Anderson, wife of James Anderson, died, seized, subject to a mortgage, on December 13th, 1874, leaving her surviving, her husband, the said James Anderson, and their children as follows:

1. Mason John, since deceased, in his 26th year.
2. Christina Pollock, now 26 years of age.
3. Andrew, now 24 years of age.
4. Charles ———, now 23 years of age.
5. Eliza Jane ———, now 19 years of age.

Mason John died intestate and unmarried and without issue.

James Anderson left Ontario in or about 1876 (two years after his wife's death) and took his four surviving children with him.

The mortgage fell due on August 10th, 1875, *i. e.*, in one year from its date, August 10th, 1874. Mrs. Anderson became entitled to the equity of redemption on August 11th, 1874, and she died before the expiration of the year. All her children were then under age as follows: (omitting Mason John)—Christina Pollock, 12 years; Andrew, 10 years; Charles, 9 years; Eliza Jane, 5 years.

The defendant, Hanna, bought and took possession in January, 1877. The statute, therefore, did not begin to run in his favour as against Christina Pollock, until 1884, at which time she came of age, and she would have five years thereafter to commence her action, that would be in 1889; and as against Andrew, until 1886, at which time he came of age, and he would have five years

Judgment. thereafter to bring an action, so that the action is brought
Robertson, J. in time by all the heirs, James Anderson, the father, however, was under no disability, and the statute ran against him from the time Hanna took possession in January, 1877. So that as against James Anderson the defendant Hanna has a good title. Anderson's title is a life estate as tenant by the curtesy. The question then arises whether the heirs-at-law can redeem and recover possession before the life estate falls in. In *Wigle v. Merrick*, 8 C. P. 307, Draper, C. J., held that persons who have interests affecting the estate, *i. e.*, the life estate of the tenant by the curtesy, will be left in the same condition in point of benefit, as if no interference or disposition of that estate by surrender or otherwise had taken place, and thus a lease made, a rent charge granted, or a judgment confessed by the tenant for life, will remain in force and affect the land during the period of the estate which is surrendered, etc., and therefore, if the defendant Hanna in this case, has acquired a title by possession, as against Anderson, the tenant for life, his title continues until the death of Anderson. In a case where the tenant for life surrenders or assigns his estate to the reversioner, Preston on Merger, at p. 454, old edition, states the general conclusion to be drawn thus: "That the particular estate becomes merged, yet all the estates derived out of that estate, and all charges imposed upon the same estate, and all interests created out of it, by the person who was at any time the owner thereof, shall have continuance notwithstanding the merger of the estate on which the incumbrances were charged or out of which they were created, in like manner as if the particular estate had continued." Again the learned Chief Justice Draper says in *Wigle v. Merrick*, 8 C. P. at p. 316: "He (Preston) also gives his opinion in regard to the effect of merger (Preston on Merger, p. 577) on the Statute of Limitations, to the effect that persons having rights or titles in respect to the successive estates, cannot cause the effect of surrender or merger of the right or title to a particular

estate so as to accelerate the right of the person who is ^{Judgment.} entitled under the reversion or remainder, to pursue his ^{Robertson, J.} remedy and prosecute his right. Such merger, surrender, or extinguishment would prejudice the person, who under the Statute of Limitations, had acquired a title as against the rightful owner of the particular estate, and, referring to cases where the tenant for the particular estate releases to the disseisor, he concludes, that when there is a disseisin of tenant for life, and as a consequence (with the exception of the King) of a person who has the remainder or reversion, then the release by the tenant for life operates by way of confirmation of title, by adding the right to the seisin, and no *real action can be maintained by the person who has the reversion or remainder until the determination of the term of enjoyment conferred by the estate for life.*

* * * Even without the authority of decided cases, I should attach great weight to the opinion of a real property lawyer of such profound learning as Mr. Preston. He refers, however, to Co. Lit. 256 b, 275 a. In Co. Lit. 357 b. and 358 b. it is said: 'Having regard to the parties to the surrender, the estate is absolutely drowned, but having regard to strangers who were not parties or privies thereto, *lest by a voluntary surrender*, they may receive prejudice *touching any right or interest they had before the surrender*, the estate surrendered hath in consideration of law a continuance.'

The result is that so far as the plaintiff James Anderson is concerned, I am of opinion that the Statute of Limitations has barred his right to recover, and this is apart altogether from the defendants' rights under the title obtained by Hanna, as purchaser under the power of sale contained in the mortgage; and the defendants being in possession can set up the life estate of James Anderson, the father, and the interest acquired by virtue of the Statute of Limitations under it against the rights of the other plaintiffs, the reversioners, to recover in this action, except in so far as they may be entitled to redeem, subject to the right of the several defendants to hold as against them so long as the tenancy for life is in existence.

Judgment. The question remaining to be disposed of, then, is whether
Robertson, J. the power of sale contained in the mortgage under which
the defendant Hanna purchased, was properly exercised
or so exercised as to preclude the plaintiffs, other than
James Anderson, from redeeming.

The mortgage, it must be borne in mind, was given by
plaintiff James Anderson when he was owner of the fee ;
on the following day he conveyed his equity of redemption
to one Wm. S. Thompson, consideration expressed to be
\$1,200 ; on the same day Thompson, in consideration of
a like sum, conveyed to Ellen Anderson, wife of James
Anderson, the mortgagor ; afterwards, on December 13th,
1874, Ellen Anderson died intestate, leaving her surviving
her husband and their children, the other plaintiffs, all
infants, her heirs and heiresses-at-law, entitled, as she
was, to the equity of redemption, subject to the life
estate of their father, who became tenant for life, by
the curtesy of England, on the execution of the deed
conveying Thompson's equity of redemption to his
wife Ellen. The proviso contained in the mortgage
is in these words: "Provided that the said mortgagee
(Isaac Abbott) in default of payment for one month
may, without any notice in writing, enter upon and
lease or sell the said lands." Before default was made
Abbott duly assigned the mortgage, the money thereby
secured, &c., together with the full benefit of all powers and
of all covenants and provisoes contained therein to one
Margaret Brown, on July 6th, 1875, and on June 8th,
1876, Margaret Brown assigned the same to John C. Gray,
who, on January 16th, 1877, caused the property
therein mentioned to be sold by auction under the power
of sale contained in the mortgage, at which sale the defend-
ant Hanna became the purchaser at the price of \$475, and
on the 19th day of the said last mentioned month Gray
conveyed in fee to Hanna. At the date of the sale, and
for several months before, the mortgagor and his infant
children, who had the right as heirs and heiresses-at-law
of their deceased mother to redeem, were out of the country,

and it is not in evidence that any notice whatever had been given to either Anderson or the said heirs or heiresses-^{Judgment.} Robertson, J. at-law, or any one of them.

The objection is taken that the power of sale did not enure to the benefit of the mortgagee's assignee; that the mortgage purports to be made "in pursuance of the Act respecting short forms of mortgages," but in regard to the form of words used, does not adopt the words prescribed in column one of schedule D. to the Act, which are as follows: "Provided that the said mortgagee on default of payment for — months, may on — notice, enter on and lease or sell the said lands." And *Re Gilchrist and Island*, 11 O. R. 537, is relied on, that being a case between the assignee of the mortgagee, and the mortgagor, as it is here, between the assignee of the mortgagee and the heirs of the party entitled to the equity of redemption, who stand in the same position as the mortgagor, had he not conveyed his equity of redemption. My attention, however, is drawn by counsel for defendants to the case of *Clark v. Harvey*, 16 O. R. 159, in which ROSE, J., in the Divisional Court dissented from the Chancellor, in *Re Gilchrist and Island*, and in which STREET, J., concurred with the Chancellor, and to the case of *Pottruff v. Tweedle*, tried before me at the last Hamilton Sittings (not reported) in which I held that it was not necessary to make an entry by the mortgagee before sale, etc. But *Clark v. Harvey*, as well as *Pottruff v. Tweedle*, were between the original parties to the mortgage. Now, in this case, the question arises on a power of sale, in which the same words are used as in *Pottruff v. Tweedle*, except in that case the power could be exercised, immediately upon default, whereas, in this one month is to elapse, and there the power was exercised by the original mortgagee, whereas here it has been exercised by an assignee. All the reasons, therefore, given by the learned Chancellor in *Re Gilchrist and Island*, and by Mr. Justice STREET in *Clark v. Harvey*, apply with equal, if not greater force in this case, the

Judgment. parties entitled being infants, for holding that the assignee Robertson, J. could not confer a good title upon the purchaser, etc.

The result, therefore, is that the action, so far as the plaintiff James Anderson is concerned, is dismissed with costs on the grounds that the defendants have acquired a title against him, under and by virtue of their possession, for more than ten years before this action was commenced, and that the other plaintiffs are entitled to redeem; and I refer it to the Master in Ordinary to take the accounts, and to make enquiry as to whether the mortgaged premises have become depreciated by reason of the waste and dilapidation committed by the defendants and to what extent, and that whatever may be found due to the plaintiffs in respect thereof that the same be set off against the amount found due to the defendants, etc., but inasmuch as the plaintiff James Anderson cannot redeem, and the defendants have the right to the possession of the property, for and during the term of his life, I do not think the defendants, or either of them, are entitled, in taking such accounts now, to charge for any improvements made by them or any of them, or for the money expended by them or any of them on the property, unless they agree to waive their rights acquired against the plaintiff James Anderson, in which case, they consenting that judgment may be entered against them and each of them for possession, six months after the accounts are taken, the plaintiffs redeeming within that time, otherwise the taking of all the accounts is postponed until after the death of the plaintiff James Anderson, the life tenant. The costs of the plaintiffs other than James Anderson, should be paid by the defendants up to and inclusive of the trial, the costs of the reference to be paid by the plaintiffs, other than James Anderson, unless the defendants consent as aforesaid, in which case they are to be paid by all the plaintiffs as in an ordinary case for redemption.

A. H. F. L.

[CHANCERY DIVISION.]

LEESON V. THE BOARD OF LICENSE COMMISSIONERS OF
THE COUNTY OF DUFFERIN ET AL.

Mandamus—Taverns and shops—License commissioners—Notice of action
—R. S. O. ch. 194.

A mandamus will not be granted to compel a board of license commissioners to issue a license to a person to whom one has been granted, but not issued, by the retiring commissioners, where they have not completed their functions, their acts having been reversed by their successors in office.

A notice of action is necessary in an action for damages against a board of license commissioners acting under R. S. O. ch. 194.

THIS was an action brought by W. E. Leeson against the Statement.
board of license commissioners of the county of Dufferin and James E. Duffy and William Ryan, the last two defendants being the holders of the last two licenses granted by the board.

The action was tried at Toronto, on November 22nd, 1889 before FALCONBRIDGE, J., without a jury.

Bigelow, Q. C., and Hughson, for plaintiff.

Delamere, Q. C., and Elgin Meyers, for defendants.

The plaintiff had petitioned for a license and his application had been approved of by the inspector. He had paid his money in and a resolution of the board had been passed granting him a license as No. 7 on their list. The inspector was instructed to notify him that it was granted, and he did so, and plaintiff provided a fire escape for his premises in compliance with a supposed regulation of the board of commissioners. Two of the commissioners then resigned before the license was issued, and the new board refused to issue him a license, and revising the action of the old board issued licenses to the defendants Duffy and Ryan instead of the plaintiff and another favoured by the former board.

Statement.

The action was brought to set aside and cancel the last two licenses granted or one of them, as subsequent to the plaintiff's, and to compel the board to grant him one, and if it was found that they had put it out of their power to grant him one then for damages.

Judgment was reserved, and was subsequently delivered as follows :

January 20th, 1890. FALCONBRIDGE, J. :—

I cannot find any ground on which I think I can, or ought to, set aside the licenses issued to Duffy and Ryan, or direct the issue of a license to plaintiff.

The license in question was, amongst others, signed in blank by the Provincial Secretary, forwarded to the local officer, and recalled by the Department before issue. Two of the old board had signed—one of them after his resignation, and before its acceptance—but no name of a licensee had been filled in.

No certificate of the commissioner, under sec. 12, sub-sec. 2 of ch. 194 R. S. O., was ever furnished to the inspector.

The provisions of sub-sec. 13 of sec. 11 have no application to the present case, but only to the case of the board hearing and disposing of formal objections to the granting of a license.

The commissioners have issued all the licenses they are entitled to issue. Both municipal censuses are probably bad, and under the Dominion census the number allowed would be eight, whereas nine have been issued.

In my opinion the plaintiff has failed to establish any right to invoke the interference of the Court, and the action must be dismissed with costs.

From this judgment the plaintiff appealed to the Divisional Court, and the appeal was argued on February 28th and March 1st, 1890, before FERGUSON and ROBERTSON, JJ.*

* A long and exhaustive argument was had by both sides on the merits, but as the case went off on the point of the necessity for notice of action it is not necessary to refer to it.—REP.

Marsh, Q. C., for the plaintiff.

Argument.

Delamere, Q. C., for the defendants.

March 1st, 1890. FERGUSON, J.:—

This case has been fully and ably argued on both sides. Since the adjournment I have seen and consulted with my brother, Falconbridge, who tried the action, and I do not think that any special benefit would be had by reserving judgment.

The plaintiff's case fails on two grounds:

1. As to the mandamus. That point was not given up and abandoned, but it was not pressed upon the consideration of the Court. The granting of a mandamus would be improper, and I think the plaintiff's counsel was quite right, when he could not see his way clear to that mode of relief, in virtually admitting the fact.

2. As to the damages. I consider the want of notice before action is a complete answer. The defendants had jurisdiction in the premises under the statute R. S. O. ch. 194, and they believed they were *bond fide* acting under the provisions of that Act, and so they were entitled to notice of action. It is sufficient if they really thought they were acting under some authority. No notice of action having been given, I must hold that the action fails on that ground, and in doing so it is not necessary for me to consider any of the other grounds urged upon our consideration.

ROBERTSON, J.:—

I concur in what has just been said by my brother, Ferguson. I consider the board of commissioners are public officers, and as such entitled to notice of action, and that notice not having been given the plaintiff's action fails. This is not a case for a mandamus; no demand was made, and no refusal proved.

Judgment affirmed, with costs.

G. A. B.

[QUEEN'S BENCH DIVISION.]

DODDS V. CANADIAN MUTUAL AID ASSOCIATION.

Insurance—Life—Provision for payment in case of “total disability”—Construction of provision—Evidence.

The plaintiff, who was a farmer, had his life insured by the defendants, and there was a clause in the policy or certificate of insurance providing that in case of “total disability” of the insured the insurers would pay him one-half of the amount of the insurance. About two years after effecting the insurance the plaintiff conveyed his farm to his son, reserving to himself and wife certain benefits, but continued to work upon the farm for about a year thereafter, when he was attacked by bronchitis and asthma.

In an action to recover one-half the amount of the insurance the evidence shewed that the plaintiff was totally disabled, permanently and for life, from doing manual labour, and that the diseases from which he suffered were the proximate and immediate cause of his disability. A medical witness said that he considered the plaintiff's condition attributable to a considerable extent to his advanced years, he being about seventy :—*Held*, that total disability to work for a living was what was intended to be insured against, and disability from old age was not excluded, and the evidence shewed that the plaintiff came within the terms of the certificate. The arrangement made by the plaintiff with his son after the certificate was issued could have no effect upon the prior contract of insurance.

Statement.

THE plaintiff alleged that the defendants by their certificate of membership dated the 1st day of April, 1882, in consideration of the representations made in this application therefor, by the plaintiff and of the sum of \$11, which was then paid, and of the further payment of an assessment of \$1 to be levied by the defendants at the death of a member of the defendants' association, in accordance with the rules and regulations of such association, insured the life of the plaintiff, who thereupon became a member of the defendants' association, in the amount of such sum as would equal eighty-five per cent. of the amount collected of the assessment made for the payment thereof, but not to exceed \$1,100; and that the defendants also by said certificate promised and agreed to pay the said amount in conformity with the rules and regulations of the association, to the son of the plaintiff, Samuel Dodds, \$600, and the balance to his wife Catherine Dodds, within ninety days after due notice and proof of

the death of the plaintiff; and in case of total disability of the plaintiff they agreed to pay one-half of the amount of said insurance of \$1,100 to the plaintiff. That the said certificate was issued by the defendants and accepted by the plaintiff upon certain conditions therein set forth, which were duly complied with. That long before the commencement of this action the plaintiff became totally disabled, and thereupon became entitled to one-half of the amount of the insurance above set forth. That the defendants refused to pay that sum or any part thereof. And he averred performance of all conditions precedent, and that all things had happened and all times elapsed to entitle him to recover the said sum; and he claimed the sum and interest from 30th March, 1889. Statement.

The defendants alleged that they were an association incorporated under chapter 167 of the Revised Statutes of Ontario, 1877, known as an Act incorporating benevolent, provident and other societies. They denied that the plaintiff after becoming a member of the defendant association became disabled. They also denied that all conditions had been fulfilled, that all things had happened, and that all times had elapsed to entitle the plaintiff to the payment of the sum claimed, and they denied that they were indebted in any sum whatever to the plaintiff, and that the plaintiff had any cause of action whatever against the defendants. Issue.

The cause was tried at the Sittings of this Court at Orangeville in the autumn of 1889 by FALCONBRIDGE, J., without a jury.

The only question in controversy at the trial was whether there was total disability within the meaning of the certificate, by which the defendants promised and agreed that "in case of total disability" they would pay one-half of the amount of the certificate to the insured. It appeared that the certificate was issued on the 1st of April, 1882, and that at that time the plaintiff was farming a farm owned by him in the township of Caledon and was a farmer by occupation; that about two years after

Statement.

the certificate was issued the plaintiff conveyed his farm, upon which there was a mortgage of \$2,000, to his son, the latter agreeing to allow him and his wife to continue to live in the dwelling-house and to have some other privileges, and to pay them \$200 a year; that after this he still continued to work on the farm, and about a year after he conveyed the farm to his son he was attacked by bronchitis and asthma, and about two years after he was so attacked he became unable by reason of these complaints to do any work on the farm or to do any kind of work; and he described the effect any kind of work had upon him, compelling him immediately to desist from it.

Evidence was given by a medical man that these diseases, combined with the plaintiff's increasing years, incapacitated him from doing any work on the farm—any manual labour. Evidence was also given by his son and two of his neighbours that he was wholly unable to work. The medical director of the defendants stated that the applicant was a man approaching seventy years of age, and at that age a man might be expected to shew symptoms of declining health, and that he considered his condition to be attributed to a considerable extent to his advanced years; that he would not consider that the combination of bronchitis and asthma would in most cases cause total disability; that he would define total disability to be a condition in which a person is totally unable to do anything by which he could support himself or his family; he also shewed, as did the secretary of the defendants, that the defendants issued certificates such as the one in this case to wealthy persons who had retired from business.

The learned Judge found for the plaintiff, and directed judgment to be entered for him for \$550, with full costs of suit.

At the Hilary Sittings, 1890, the defendants moved to set aside this judgment and to dismiss the action with costs on the following grounds: (1) That the judgment was against law and evidence and the weight of evidence. (2) That the evidence did not shew the plaintiff to be

totally disabled within the proper meaning of these words^{Statement.} or within the meaning of the certificate of membership issued by the defendants to the plaintiff, and the rules, by-laws, and regulations of the defendant association, and that therefore the plaintiff was not entitled to recover in this action. (3) That the plaintiff did not comply with the by-laws, rules, and regulations of the defendant association and did not perform the conditions precedent to his right of action, in that he did not deliver to the defendants before the action a certificate that he was wholly disabled for life, given by two medical examiners duly approved by the medical director and board of trustees of the defendant association, as required by their by-laws, rules, and regulations, and in that the plaintiff was not as a matter of fact wholly disabled for life prior to the institution of this action. (4) And upon other grounds disclosed in the evidence and proceedings.

February 10, 1890. The motion was argued before a Divisional Court, composed of ARMOUR, C. J., and MACMAHON, J.

Watson, Q. C., for the defendants. At the time the plaintiff was attacked by asthma or bronchitis he was not carrying on any trade or business. He was not disabled from the enjoyments of life, and he was not disabled from work, because he had retired from work. The plaintiff's disability, if any, is as much on account of age as disease. The disability intended must be such as to disable a man from doing all his work, not only a part of it, and it must not arise from age alone. The plaintiff is not disabled from occupation, because he has no occupation. I refer to *Lyon v. Railway Passenger Ass. Co.*, 46 Iowa 631; *Rhodes v. Railway Passenger Ins. Co.*, 5 Lansing (N.Y.) 71; *Samyer v. Casualty Co.*, 8 Law Reg. N. S. (Mass.) 233, 235; *Hooper v. Accidental Death Ins. Co.*, 5 H. & N. 546; Bliss on Insurance, 2nd ed., pp. 723-5; Porter on Insurance, 2nd ed. p. 460. None of the authorities refer to the case of a

Argument. man who has no occupation. This kind of insurance is for indemnity, differing from life insurance, and if a man lives on his means without occupation, he cannot claim indemnity.

Elgin Meyers, Q. C., for the plaintiff. The evidence shews that the plaintiff did not give up work until obliged to do so by disease.

March 8, 1890. The judgment of the Court was delivered by

ARMOUR, C. J.:—

The words “total disability” used in the certificate are there used without any limitation whatever, either as to the duration of the disability, or as to the cause from which it shall arise, or as to the doing of what there shall be the disability.

Total disability may be temporary or it may be permanent; it may arise from various causes, such as illness, old age, or accident; and there may be total disability to do some things and not others. Construing, however, the words “total disability” used in the certificate to mean permanent total disability or total disability for life, the evidence shewed beyond dispute that the plaintiff was totally disabled permanently and for life from doing manual labour.

The evidence also shewed that the diseases from which the plaintiff suffered were the proximate and immediate cause of his total disability.

Increasing years were no doubt tending to bring about gradually total disability, but the diseases hastened it and brought it on before its time.

But, as I have shewn, total disability arising from old age is not excluded by the terms of the certificate from its benefits.

Total disability to work for a living would seem to be what was intended to be insured against by the certificate, and this was the view taken of it by the medical director

of the defendants, and the evidence established that the plaintiff was totally disabled to work for a living. Judgment.
Armour, C.J.

The only employment he could have obtained would have been to do manual labour, and this he was totally disabled to perform.

The arrangement which was made after the certificate was issued, with his son, by which he conveyed his farm to his son in consideration of certain benefits to be conferred on him by his son, could have no effect upon the prior contract made by the defendants with him, evidenced by the certificate.

The objection taken to the formal proofs of total disability furnished to the defendants, if there is anything in it, is not available to the defendants under the pleadings.

The motion must be dismissed with costs.

[QUEEN'S BENCH DIVISION.]

HAMILTON V. GROESBECK ET AL.

Master and servant—Injury to workman by unguarded saw—Action for negligence—“Moving,” meaning of in sec. 15 of Factories Act, R.S.O. ch. 208—“Defect,” meaning of in sec. 3 of Workmen’s Compensation for Injuries Act, R. S. O. ch. 141.

By sec. 15 of the Factories Act, R. S. O. ch. 208, it is provided that all belting, shafting, gearing, fly-wheels, drums, and other moving parts of the machinery shall be guarded :—

Held, that the word “moving” is used in its transitive sense, and signifies “propelling,” and that no duty is imposed by the section upon owners of saw mills to guard the saws which are propelled by the moving parts of the machinery.

By sec. 3 of the Workmen’s Compensation for Injuries Act, R. S. O. ch. 141, where personal injury is caused to a workman by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer, the workman shall have the same right of compensation and remedies against the employer as if he had not been engaged in his work :—

Held, that the want of a guard to a saw was not a defect within the meaning of this provision.

Such a defect must be an inherent defect, a deficiency in something essential to the proper user of the machine.

And where a workman in a saw mill was injured by being thrown against an unguarded saw, and it was shewn that a guard would have prevented the injury :—

Held, that an action for negligence was not maintainable against the owners at common law, nor by virtue of either of the above mentioned statutes.

Statement.

THE statement of claim set forth (2) that the plaintiff on the 15th August, 1888, was employed by and in the service of the defendants, and was at work in their stave mill cutting and piling up the staves as he cut them in the said mill ; (3) that on the said 15th August, 1888, it was the plaintiff’s duty to cut staves at a stave saw in the defendants’ mill and pile up the said staves in the said mill when cut ; (4) that owing to the defective condition of the said saw, in that it was not guarded by any frame or enclosure so as to prevent a person from being thrown upon the saw or coming in contact therewith, as it well might have been, and as such saws are generally guarded, and owing to the want of room to pile the staves cut by the same, and having to pile, at the direction of the defendants, said staves too high without having any proper stay

or framework to prevent the said staves from falling, a Statement.
large quantity of such staves piled by the plaintiff in the defendants' mill, according to the direction of the defendants, fell upon the plaintiff whilst he was properly discharging his said duty and threw him upon the said saw, which was unguarded ; (5) that the defendants at the time of and previous to the plaintiff receiving the injury complained of, knew or ought to have known of the unsafe and defective condition of the said saw, and of the narrowness of the place where said staves were directed by them to be piled, and of the want of stays or framework to prevent the same from falling, and it was altogether owing to their negligence that the said saw was not put into a safe condition by being properly guarded and a proper place provided for the piling of said staves ; (6) that had the said saw been in a proper condition by being properly guarded, the plaintiff would not have come in contact with the same when he fell or was thrown down ; and had a proper place been supplied for the piling of said staves, the plaintiff would not have been thrown upon said saw ; (7) that the plaintiff was aware that the defendants knew of said defects ; (8) that in consequence of the premises, the plaintiff's left arm was sawn off or so injured by the said saw that he had to have it amputated ; and he was otherwise injured, and he endured great pain and suffering, and was put to expense for surgical and other charges, and lost sums of money which he would otherwise have earned for wages ; and sustained permanent injuries which would for life deprive him of his usual means of subsistence.

The statement of defence set forth (2) that the defendants denied that they were guilty of any negligence, either in the manner of guarding their saw or in the directions given to the plaintiff as to the piling of the staves ; (3) that the defendants said that the accident which happened to the plaintiff was caused solely by the careless and negligent conduct of the plaintiff, and was not in any other way attributable to the fault of the defendants or either of them.

And thereon issue was joined.

Statement. The cause was tried by ROSE, J., at the sittings of this Court at Chatham in the Autumn of 1889, with a jury.

The plaintiff, a lad of seventeen, was employed by the defendants to work at an equalizing machine in their saw mill. This machine consisted of a circular saw, nineteen inches in diameter, run by the motive power of the saw mill, and set in a frame, which was placed with the saw, standing east and west, about seven feet from one wall of the saw mill, and about two feet four inches from the wall running at right angles to the former wall. This machine was used for the purpose of sawing staves to a prescribed length, which work the plaintiff was engaged to perform; and as the staves were sawed by the machine he threw them in a pile behind him to the east of the saw. After a time it became necessary from the size of the pile to carry the staves so piled out of the mill to the place in which they were to be put, and the plaintiff began to do so; and his account of what took place was thus given: "Q. Now tell the jury how you came to meet with this accident? A. I was taking the staves out of the mill and I was in the act of taking a bunch down when they fell on me. Q. Were they tied up? A. No, sir; I was in the act of taking them down when they started, and I fell right backwards and the staves on top of me. Q. Where did you fall? A. Fell right down between the saw and the wall. Q. Backwards? A. Yes, sir. Q. Did you suffer any injury? A. Yes, sir; I had my arm cut. Q. The left arm? A. Yes, sir. Q. Did it come in contact with the saw? A. Yes. Q. Shew to the jury how you fell? A. I fell right backwards. Q. Were your arms extended? A. Yes, sir. I put my arms out to save myself. Q. And one arm came against the saw? A. Yes, sir. Q. And it was sawn off? A. Yes, sir."

Evidence was given to shew that if there had been a guard over the saw the plaintiff would not have been injured, and that saws used for a similar purpose in another mill in the same locality had guards; but it was

shewn that in the great majority of cases in which saws were used for a like purpose no guards were used. Statement.

The learned Judge left the following questions to the jury, which they answered as follows :

1. Was the machine in question defective in not having a guard ? A. Yes.

2. If so. would the injury have been caused if there had been a guard ? A. No.

3. Was the plaintiff negligent ? A. No.

Upon these findings the learned Judge gave judgment for the plaintiff for \$250, the damages assessed by the jury.

The defendants moved before the Divisional Court to set aside the verdict and judgment, and to enter judgment for the defendants.

November 29, 1889. The motion was argued before ARMOUR, C. J., and STREET, J.

J. S. Fraser, for the defendants. The action is placed on the ground that it was a defect that there was not a guard on the saw. The jury were not asked to say whether it was negligent to have the saw unguarded ; they were asked if the machine was defective. The jury have negatived contributory negligence, but the evidence is uncontradicted that if the plaintiff had obeyed the directions given him he would not have been injured. There was no negligence in the usual sense on the part of the defendants ; leaving the saw unguarded was not negligence, nor was it a defect within the meaning of the Workmen's Compensation for Injuries Act. I refer to the following cases : *Miller v. Reid*, 10 O. R. 419 ; *Thomas v. Quartermaine*, 17 Q. B. D. 414 ; 18 Q. B. D. 685 ; *Walsh v. Whiteley*, 21 Q. B. D. 371 ; *Rudd v. Bell*, 13 O. R. at pp. 51, 52 ; *Griffiths v. London, &c., Docks Co.*, 12 Q. B. D. 493 ; 13 Q. B. D. 259.

Aylesworth, for the plaintiff. The plaintiff is entitled to succeed either on the ground of a defect in the machinery under the Workmen's Compensation for Injuries Act, or

Argument. on the ground of the breach of a duty imposed by the Factories Act to guard the machinery. The jury have found that there was a defect, and it was a question of fact for the jury. I refer to *Paley v. Garnett*, 16 Q. B. D. 52; *Heske v. Samuelson*, 12 Q. B. D. 30; *Thrussell v. Handyside*, 20 Q. B. D. 359; *Membery v. Great Western R. W. Co.*, 14 App. Cas. 179; *Cripps v. Judge*, 13 Q. B. D. 583; *Yarmouth v. France*, 19 Q. B. D. 647; *Dean v. Ontario Cotton Mills Co.*, 14 O.R. 119. The maxim *volenti non fit injuria* does not apply; the jury were not asked whether the plaintiff was *volens*.

March 8, 1890. The judgment of the Court was delivered by

ARMOUR, C. J.:—

It is quite plain that, according to the facts proved in this case, the defendants were not guilty of any negligence for which the plaintiff could maintain his action against them at common law for the injury which he sustained, and unless the defendants were guilty of negligence causing his injury by reason of the omission by them of some statutory duty imposed upon them, or unless some statutory remedy is given to the plaintiff against the defendants for such injury, the plaintiff's motion must fail.

It is accordingly contended that the defendants were guilty of negligence in omitting to guard the saw, and the provisions of the Ontario Factories Act, R. S. O. ch. 208, are invoked to support this contention.

That Act provides by section 15, that in every factory (which includes a saw mill), "all belting, shafting, gearing, fly wheels, drums, and other moving parts of the machinery * * shall be, as far as practicable, securely guarded."

We think, however, that the word "moving" here used, is so used in its transitive signification, and as if the word

“propelling” had been used, and that it was not intended to provide that the tools and instruments moved or propelled should be guarded, but only the machinery moving or propelling them; and that the words “other moving parts of the machinery” are referable only to parts of the machinery used for a like purpose as the belting, shafting, gearing, fly wheels, and drums. Judgment.
Armour, C.J.

Upon this construction, therefore, of this provision, there was no statutory duty imposed upon the defendants to guard the saw.

It is also contended that the plaintiff has a statutory remedy for the injury which he sustained by virtue of the Workmen's Compensation for Injuries Act, R. S. O. ch. 141, which provides by section 3 that “where personal injury is caused to a workman by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer, the workman shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work;” it being contended that the want of a guard to the saw was a defect within the meaning of this provision.

It would be a very wide construction to put upon this provision, and one not warranted by the terms of it, to hold that the want of a guard to the saw was a defect in the condition of the saw, when such guard was no part of the saw, nor of the machinery connected therewith, nor at all necessary for any proper or reasonable fitness of the saw for the purpose for which it was used.

In some of the cases which I have looked at it is laid down that the condition of ways, works, machinery, and plant is defective within the meaning of this provision when such ways, works, machinery, and plant are not reasonably fit for the purpose for which they are used.

If such fitness is to be the test by which to determine whether the condition of the ways, works, machinery, and plant is defective or not, then the condition of this saw

Judgment. was not defective, for it was fit and reasonably so for the Armour, C. J. purpose for which it was used.

It seems to me that to make the condition of ways, works, machinery, and plant defective within the meaning of this provision, there must be some inherent defect in them—a deficiency in something essential to their proper user for the purpose for which they are to be used, and not a deficiency in something in no way essential to their user, or for the purpose for which they are to be used.

In my opinion, therefore, the plaintiff must fail, and his action be dismissed with costs.

I refer, in addition to the cases cited on the argument, to *McGiffin v. Palmer*, 10 Q. B. D. 5; *Heske v. Samuelson*, 12 Q. B. D. 30; *Cripps v. Judge*, 13 Q. B. D. 583; *Haston v. Edinburgh*, 14 Ct. of Sessions Cases, (4th series) 621; *McQuade v. Dixon*, 14 Ct. of Sessions Cases (4th series), 1039; *Fraser v. Hood*, 15 Ct. of Sessions Cases (4th series), 178; *Pegram v. Dixon*, 55 L. J. Q. B. 447; *Corcoran v. East Surrey*, 5 Times L. R. 103; *Pack v. Hayward*, *ib.* 233; *Pooley v. Hicks*, *ib.* 353; *Smith v. Harrison*, *ib.* 406; *Smith v. Baker*, *ib.* 518; [*Pritchard v. Lang*, *ib.* 639.

May 5, 1890. ARMOUR, C. J.:—*Sed vide Morgan v. Hutchings*, 6 Times L. R. 219, decided since this decision.

[QUEEN'S BENCH DIVISION.]

MENDELSSOHN PIANO COMPANY V. GRAHAM AND WEST.

*Partnership—Agreement for participation in profits—Construction of—
Relationship of parties—Joint business—Debtor and creditor.*

The plaintiffs sued G. and W. for the price of goods sold to the firm of P. W. G. & Co., and the principal question in the action was whether W. was an actual partner in the firm; the evidence failing to shew that he was an ostensible partner and as such liable to third persons:—
Held, that the true test to be applied to ascertain whether a partnership existed was to determine whether there was a joint business, or whether the parties were carrying on business as principals and agents for each other.

G. and W. did not intend to create a partnership between them. G. was carrying on business in the name of P. W. G. & Co., as a dealer in pianos and organs, and, being in want of money, applied to W. for a loan; he did not ask W. to become his partner, nor did W. suggest it, but G. proposed to give W. half the profits of his business if W. would lend him \$500.

The money was advanced and the following receipt was given by G. :—

“TORONTO, 13th February, 1888.

Received from W. the sum of \$500 to be used for carrying on the business of dealers in pianos and organs, in return for which I hereby agree to give the said W. one-half of the profits of the said business, after all expenses have been paid, including the sum of \$10 a week, which is to be charged as wages to G., this arrangement to continue until the 1st day of January, 1889, and to be continued thereafter if desired by Mr. W. The said W. reserving a claim upon instruments in the store to the value of \$500, and he can also at any time demand the said sum upon giving one month's notice, in which case this agreement would be at an end.”

W. made a subsequent advance of \$500 to G., and on the 14th of April, 1888, a receipt was given for such advance containing an agreement to pay “over and above the agreement of the 13th of February, interest at the rate of eight per cent. per annum.”

This receipt was at the request of W. signed “P. W. G. & Co., p. P. W. G. sole partner of said firm” :—

Held, that these documents did not establish that the business was the joint business of G. and W. or that they were carrying it on as principals or agents for each other; but that they did establish that the true relation was that of debtor and creditor; and W. was therefore not liable to the plaintiffs.

THIS was an action brought by the plaintiffs to recover Statement.
from the defendants the price of goods sold and delivered by the plaintiffs to the firm of P. W. Graham & Co., the plaintiffs alleging that the defendant West was a partner in the said firm. The defendant West denied that he was a partner, and said that the only dealings he had with said Graham, apart from a small grocery account, or with the

Statement

said firm of P. W. Graham & Co., were that during the year 1888 he loaned the said Graham personally various sums of money, amounting in all to about \$1,825, for the purpose of enabling him to continue to carry on the business of said firm, taking as security for the repayment thereof a lien or claim upon the musical instruments held by said firm; and by way of interest on such advances was to receive a proportion of the profits of the business; and that it was at the same time distinctly understood and agreed that he did not become a partner in the said firm.

The cause was tried by FALCONBRIDGE, J., without a jury, at the Fall Sittings of this Court at Toronto, 1889.

It appeared that the defendant Graham, prior to the transactions which were claimed to have constituted the defendant West a partner with him, was carrying on business in Toronto under the name of P. W. Graham & Co., and had been so carrying on business for some time, and to the knowledge of the plaintiffs; that the defendant Graham continued to carry on business during the said transactions and until some time in October, 1888, when he ceased to carry on business. That the defendant West was a grocer who kept a shop in the Davenport road, and the business of P. W. Graham & Co. was carried on by the defendant Graham in the Arcade, and afterwards in King street in a store leased by him from the plaintiffs. That Graham did not ask West to go into partnership with him, nor did West suggest a partnership: that Graham applied to West for a loan, and West lent him \$500, taking the following receipt:

“Toronto, 13th February, 1888.

Received from Charles West the sum of five hundred dollars, to be used for carrying on the business of dealers in pianos and organs, in return for which I hereby agree to give the said Charles West one-half of the profits of said business after all expenses have been paid, including the sum of ten dollars a week which is to be charged as wages to P. W. Graham. This arrangement to continue until the 1st day of January, 1889, and to be continued

thereafter, if desired by Mr. West. The said Charles West ^{Statement,} reserving a claim upon instruments in the store to the value of five hundred dollars, and he can also at any time demand the said sum upon giving one month's notice, in which case this agreement would be at an end.

P. W. GRAHAM."

Afterwards, the following document was signed by both parties :

"Toronto, 15th February, 1888.

Received from Charles West the sum of five hundred dollars, to be used for the purpose of carrying on the business of dealers in pianos and organs, the profits to be divided equally between myself and the said Charles West, the sum of ten dollars per week being allowed P. W. Graham as wages.

P. W. GRAHAM."

"I hereby agree to the above terms.

CHAS. WEST."

Graham and West disagreed in their evidence as to whether this document was signed on the day it bears date, but they both agreed that it was signed because Graham wanted to have the agreement with West's signature to it in his possession, as he had nothing to shew the agreement. Afterwards Graham applied to West for a further loan, and the following document was drawn up :

"Toronto, 14th April, 1888.

Received from Charles West, Esq., on loan a note for five hundred dollars, made by C. E. Kyle of Toronto, payable to J. A. McLellan, and indorsed by you, dated 5th June, 1887, at twelve months, bearing interest at 8 per cent. We further agree to pay you over and above the agreement of 13th February, interest at the rate of 8 per cent. per annum on the sum of five hundred dollars.

P. W. GRAHAM & Co.

Per P. W. Graham, sole partner of said firm."

All the foregoing documents were drawn by the defendant Graham, who said he signed the last above mentioned

Statement. document as he did at the request of West, and West said it was signed in that way to satisfy him because he had nothing to do with it (meaning the business).

In June and July following West indorsed two notes for Graham, amounting to \$825, and in October Graham ceased carrying on the business, because, as he said, West would not continue to indorse for him.

The case was argued at the conclusion of the evidence.

R. S. Neville, for the plaintiffs.

Coatsworth, for the defendant West.

December 13, 1889. FALCONBRIDGE, J.:—

The case of *Badeley v. Consolidated Bank*, 38 Ch. D. 238, is the one that has gone the furthest to weaken, if not to destroy, the theory that a participation of profits necessarily involves a partnership. In the case with which I am to deal the only writing signed by both parties is a memorandum dated 15th February, 1888. Now in the *Badeley Case* there is a most elaborate agreement shewing the relationship between the parties to be, not that of partners, consequently not that of principal and agent, but that of debtor and creditor. And of course there can be no doubt now that the creditor can be secured by a share of the profits, although some time ago that was not the law. Now two other memoranda were put forward, and it was claimed that one of them, namely, that of the 13th of February, shewed rather the understanding between the parties than the one bearing date the 15th of February. And I am not sure that, even in the construction of that instrument, the idea of the partnership is entirely excluded. It is true that Charles West, who claims to be a creditor in that document, reserves a claim upon instruments in the store to the value of \$500, and it is provided that he can also at any time demand such sum upon giving one month's notice, in which case "this agreement would be at an end." Now that does not, I apprehend, exactly impose on Graham a personal liability. It seems to me rather that he is entitled to draw his money out of the concern. But Graham says that the agreement which bears date the 15th February was the original agreement, and on re-examination he says that the money was advanced under that

agreement or memorandum. West says in the witness box on cross-examination that it truly expresses the agreement between them. Graham says that West got information about the sales, profits, and expenses, and that he came to the store two or three times a week, and gave assistance about unpacking a piano and made inquiries, and so on. And West says positively there was no distinct agreement between them that he was not a partner. I do not find in Graham's evidence any sign of hostility towards the defendant West at all. I think wherever there is a conflict of testimony between West on the one hand and Graham, or Baird or Barker (the manager and secretary of the plaintiffs) upon the other, that each one of them is entitled to credence as against West, for one reason at all events, namely, that when difficulties arose West endeavoured to destroy the evidence which is furnished by this exhibit I., (the agreement of the 13th February) in other words he burnt the original. But for the fact that the present plaintiffs' solicitor happened to preserve a copy, his destruction of the paper would no doubt have ended in the plaintiff utterly failing to make out a case.

Judgment.
Falconbridge,
J.

In the view I take, that there was an actual partnership between Graham and West, it is unnecessary to decide the question whether there was any holding out of West as a partner so as to render him liable as such, even though a partnership did not in fact exist.

I think the plaintiffs are entitled to judgment.

The defendant West moved to set aside this judgment and to dismiss the action against him upon the following grounds:—1. That the judgment was contrary to law and evidence and the weight of evidence. 2. The evidence shewed that the paper writing dated 15th February, 1888, on which the learned Judge based his judgment, was not intended to be, and was not in fact, the agreement made between the parties, but was signed merely for a collateral purpose, to evidence the right of the defendant Graham to wages. 3. The paper writings dated 13th February, 1888, and 14th April, 1888, and the surrounding circumstances shewed the true agreement between the defendants. 4. The evidence shewed that it was not the intention of

Statement. the defendants by their agreements and dealings to become partners. 5. The evidence shewed that the only relation established between the defendants was that of debtor and creditor. 6. The evidence shewed that by the paper writing of 14th April, 1888, and the whole course of dealing of the defendants, the defendant Graham would be estopped from setting up a partnership, and the plaintiffs are also thereby precluded from setting up such a partnership. 7. There was no evidence of any representations to the plaintiffs binding on the defendant West, that the defendants were partners. 8. The evidence shewed that the representations made to the plaintiffs by the defendant Graham were inconsistent with the idea of a partnership, and sufficient to charge them with notice that West was not in fact a partner of Graham. 9. The evidence shewed that the line of credit on which the plaintiffs' claim was based was established in 1887, prior to the existence of the alleged partnership; and that the defendant Graham was then trading under the name of P. W. Graham & Co.; and such line of credit was continued without any change being made at or after the time of the alleged partnership. 10. The amount claimed by the plaintiffs, \$2,031.36, was a greater sum than in any event should be paid by the defendant West, and the same should be reduced. 11. The evidence shewed that it was not the intention of the defendants to create a partnership; and as there was no holding out to the plaintiffs binding on the defendant West, that the defendants were partners, and the plaintiffs relied entirely on the defendant Graham, the defendant West should not be held liable. 12. It appears clearly from the evidence that the plaintiffs were guilty of negligence in not seeking proper information as to the alleged partnership; and if it should be held that the paper writings, or any of them, constituted a partnership, the judgment against the defendant West should be without costs. 13. And on other grounds.

February 10, 1890. The motion was argued before a *Argument*.
Divisional Court composed of ARMOUR, C. J., and MAC-
MAHON, J.

Coatsworth, for the defendant West, supported the motion, referring to *Badeley v. Consolidated Bank*, 38 Ch. D. 238; *Pooley v. Driver*, 5 Ch. D. 459, and other cases cited in *Byles on Bills*, 14th ed., p. 52; *McConnell v. Wilkins*, 13 A. R. 438.

R. S. Neville, for the plaintiffs, shewed cause.

March 8, 1890. The judgment of the Divisional Court was delivered by

ARMOUR, C. J.—(after setting out the facts):—

There was nothing in the evidence which would, in my opinion, entitle the plaintiffs to recover against West on the ground that he was an ostensible partner, and therefore liable to third persons as a real partner.

It could not be fairly inferred from anything that he said or did that he was a partner with Graham, or that he was giving it to be understood that he was such partner, for his whole conduct was consistent with the position taken by him that he was a creditor of Graham, and as such interested in the business which Graham was carrying on, and there was no evidence to shew that any statements made by Graham to the plaintiffs were at all authorized by him.

His liability must, therefore, depend upon the real relation existing between him and Graham.

The true test to be applied in order to ascertain whether a partnership existed between them or not, is to determine whether there was a joint business, or whether the parties were carrying on business as principals and agents for each other: *Badeley v. Consolidated Bank*, 38 Ch. D. 238.

Had West the rights of a partner in the business carried on by Graham? If he had, then is he also subject to the liabilities of a partner.

Judgment. The evidence, apart from the documents above quoted, Armour, C.J. shews clearly, I think, that it was not intended that a partnership should be created between them, and the question is whether these documents prove such an intention.

It is necessary to state the position these parties, Graham and West, occupied at the commencement of their dealing. Graham was then and had for some time before been carrying on the business of a dealer in pianos and organs under the name of P. W. Graham & Co., and West was carrying on the business of a grocer. Graham was in want of money to carry on his business, and applied to West to lend him money. Graham did not ask West to become his partner, nor did West suggest it. Graham proposed that if West would lend him \$500 he would give him half the profits of the business: the money was accordingly advanced, and the receipt of the 13th February was given; and I may here say that my conclusion of fact is that this receipt shews the true terms upon which the money was advanced, and that the document of the 15th February was given and signed, as both Graham and West swear, in order that Graham might have in his possession a document signed by West shewing the agreement between them, but that it was only intended to shew the general terms of the agreement between them, and not the particular terms of it, which were set out in the receipt of the 13th February, and it was not intended by the document of the 15th February to at all detract from or modify the terms of the receipt of the 13th February; and this is apparent from the receipt being referred to in the document of the 14th April as the "agreement" between them. It will be unnecessary, therefore, for me further to refer to the document of the 15th February. The purpose for which the money was advanced was "to be used for carrying on the business of dealers in pianos and organs." What do these words mean? Do they mean "to be used by us for carrying on the business of dealers in pianos and organs," or do they mean "to be used for carrying on the

business ordinarily carried on by dealers in pianos and organs?" In other words, do they refer to the persons to carry on the business, or to the character of the business to be carried on? I think to the latter; and when we look at the manner in which the document of the 14th April is signed, it strengthens this view.

Judgment.
Armour, C.J.

The receipt goes on to say "in return for which," that is, in return for the use of which, "I hereby agree to give the said Charles West one-half of the profits of the business after all expenses have been paid, including the sum of ten dollars a week, which is to be charged as wages to P. W. Graham." If the business was to be the joint business of Graham and West, and was to be carried on by them jointly, there would have been no need of this stipulation, for West would have been entitled in that case, after the expenses of carrying on the business were paid, to one-half the profits; but I think that half the profits thereby made payable to West were not so made payable to West as half the profits of a joint business carried on by Graham and West, but as half the profits of the sole business of Graham, made payable to West in return for the use of the five hundred dollars advanced by him to Graham; and the fact that Graham personally agreed to give to West one-half of the profits of the business points to this conclusion.

The succeeding stipulations in the receipt, that this arrangement was to continue until the 1st day of January, 1889, and thereafter, if desired by West; that West was to have a claim upon the instruments in the store to the value of five hundred dollars; and that West could at any time demand the said sum upon giving one month's notice, in which case the agreement was to be at an end; all indicate that the true relation existing between Graham and West was not that of partners, but of debtor and creditor.

This receipt clearly created a personal liability upon Graham to pay back the five hundred dollars at any time after one month's notice, and there are no such stipulations binding upon Graham as one would expect to find in an instrument creating a partnership.

When we come to consider, however, the document of

Judgment. the 14th April, and its bearing on this receipt, we find it signed "P. W. Graham & Co., per P. W. Graham, sole partner of said firm," and we find that it was so signed by Graham at West's request as a distinct declaration by Graham that he had no partner in the business of P. W. Graham & Co.

I think that the documents above set forth do not establish that the business carried on under the name of P. W. Graham & Co. was the joint business of Graham and West, or that they were carrying it on as principals and agents for each other; but that they do establish that the true relation which existed between Graham and West was that of debtor and creditor.

I think it clear that West had not the rights of a partner in this business; for, if either Graham or West had brought an action against the other for a declaration that they were partners in the said business, and we had to determine the question upon the evidence before us in this case, could we, upon such evidence, make a decree in favour of the one seeking such a declaration? I think clearly not. It would lie upon the one asserting the partnership, as it does upon the plaintiffs in this case, to establish the partnership; and he would fail, as these plaintiffs do, in satisfying us that any partnership existed.

It is unnecessary for me to do more than refer to the cases by name by which I have been guided in arriving at my conclusion; but I desire to say this with regard to *Frowde v. Williams*, 56 L. J. Q. B. N. S. 62, decided by Denman, J., and *Hawkins, J.*, the latter agreeing with some hesitation; that it and *Aktie Bolaget v. Von Dadelszen*, also decided by Denman, J., were decided before the decision in *Badeley v. Consolidated Bank*.

I refer to *Walker v. Hirsch*, 27 Ch. D. 460; *Badeley v. Consolidated Bank*, 38 Ch. D. 238; *Mollwo, March, & Co. v. Court of Wards*, L. R. 4 P. C. 419; *White & Co. v. Churchyard*, 3 Times L. R. 428; *Debenham v. Phillips*, 3 Times L. R. 512; *Aktie Bolaget v. Von Dadelszen*, 3 Times L. R. 517.

The motion will be allowed with costs; and the action will be dismissed with costs.

[QUEEN'S BENCH DIVISION.]

C. P. REID & CO. V. COLEMAN BROTHERS.

Partnership—Dissolution—Want of public notice—Credit given to firm after dissolution—No previous dealings with firm—Liability of retiring partner.

The plaintiffs received from their traveller an order for goods from the firm of C. Bros., hotel-keepers. Before they delivered the goods they became aware by means of a mercantile agency that a partnership had existed under the name of C. Bros., and that S. L. C. was one of the members of it, and they were at the same time informed that the partnership still existed. They shipped and charged the goods, and also goods subsequently ordered, to C. Bros. As a matter of fact, however, the partnership did not exist at the time the first order was given, S. L. C. having retired from the business, and the plaintiffs had had no dealings with the firm while it was in existence. No public notice was given of the dissolution; S. L. C. continued to live at the hotel except when he was absent on his own business; the lamp with the name of C. Bros. continued at the door; the liquor license in the name of C. Bros. continued to hang in the bar-room; and letter-paper with the heading "C. Bros., proprietors" continued to be handed to customers.

Held, that where a known member of a firm retires from it, and credit is afterwards given to the firm by a person who has had no previous dealings with it, but has become aware as one of the public that it existed, and has not become aware of his retirement, the retiring member of the firm is liable unless he shews that he has given reasonable public notice of his retirement; and, as such notice was not given here, S. L. C. was liable, not only for the goods first, but for those subsequently ordered, no notice of the retirement having ever been given.

THIS was an action brought by the plaintiffs, who were Statement. wholesale cigar and liquor merchants, carrying on business at Toronto, to recover from the defendants Thomas G. Coleman and Sydney L. Coleman, under the name of Coleman Brothers, \$210.26, being the balance of an account for goods alleged to have been sold and delivered during the year 1888 by the plaintiffs to them under the name of Coleman Brothers.

The defendant Thomas G. Coleman was not served with the writ, and did not defend the action. The defendant Sydney L. Coleman denied his liability; he further set up that he and his brother, Thomas G. Coleman, formerly carried on business as hotel-keepers at St. Mary's, under the name of Coleman Brothers, but had no dealings with

Statement.

the plaintiffs; that their partnership was dissolved in November, 1887, and due notice of the dissolution given to all persons entitled to notice; that prior to the dissolution the plaintiffs had no knowledge of the firm, or that Sydney L. Coleman had been a member of it; that subsequent to the dissolution the plaintiffs had certain dealings with Thomas G. Coleman, who carried on the business on his own account, but that the defendant Sydney L. Coleman had no knowledge of such dealings, and that Thomas G. Coleman had no authority to pledge his credit.

The plaintiffs joined issue on this defence, and the action was tried on 23rd November, 1889, at Toronto, before FERGUSON, J., without a jury.

It appeared from the evidence that the defendant Sydney L. Coleman had at one time carried on business at St. Mary's on his own account; that subsequently he and the defendant Thomas G. Coleman had formed a partnership under the name of Coleman Bros., to carry on the Windsor Hotel there; that this partnership lasted only some six months, and was then dissolved in the beginning of November, 1887, and that the defendant Thomas G. Coleman continued to carry on the business in his own name; that the father and mother, two sisters, and another brother of the defendants, all lived at the hotel during the whole period covered by the transactions in question; that after the dissolution the defendant Sydney L. Coleman had his home at the hotel, but was frequently absent travelling in another business in which he was engaged, and when at the hotel occasionally assisted his brother Thomas G. Coleman in receiving guests; that a large lamp which hung outside the front door of the hotel had the name "Coleman Brothers" painted upon it, and that this was not taken down when the partnership was dissolved; that some note-paper headed "Coleman Brothers," and stating them to be proprietors of the hotel, was supplied to guests staying at the hotel as late as the end of January, 1888. The hotel register in use down to August, 1888, was one having a printed heading stating that A. Hall was the

proprietor ; he had formerly kept the hotel ; after Thomas G. Coleman became proprietor Hall's name was sometimes struck out and sometimes allowed to remain, and when struck out the name of Thomas G. Coleman was sometimes inserted in its place, and sometimes not. No public notice was given of the dissolution of the firm of Coleman Bros. The plaintiffs had had some dealings with Sydney L. Coleman before the partnership, but none with the firm during its actual existence. On 25th January, 1888, the plaintiffs' traveller was at the hotel and took the first order : whilst there he was supplied by one of the defendants with note-paper with the printed heading "Coleman Brothers, Proprietors," on it, and wrote to the plaintiffs upon this paper concerning some other orders he had taken that day at another place. He entered the order given by Thomas G. Coleman to him on that occasion in his order book as from Coleman Bros., and forwarded it in the firm name to the plaintiffs, who shipped the goods on 2nd February, 1888, to "Coleman Brothers," and charged the firm with them in their books, having first inquired of and been informed by one of the mercantile agencies that the members of the firm of Coleman Brothers were Thomas G. Coleman and Sydney L. Coleman.

In July the plaintiffs received a draft for \$105, which was not produced. On the 14th of November, 1888, they drew on Coleman Bros. for \$106.76, the amount of the sales in June. This draft was accepted by "T. G. Coleman, Coleman Bros.," but was not paid at maturity, and the plaintiffs again on the 14th of December, 1888, drew upon Coleman Bros.; their draft was accepted in the same way, but was not paid. No other payment than the \$105 was ever made to the plaintiffs, and the defendant Thomas G. Coleman had left the country and gone to the United States. The plaintiffs' traveller spoke of certain other circumstances which, if true, would have tended more strongly against the defendant Sydney L. Coleman, but the trial Judge doubted the correctness of his statements with regard to them.

Argument.

At the close of the evidence the case was argued.

Charles Millar, for the plaintiffs.

J. M. Clark, for the defendant Sydney L. Coleman.

November 25, 1889. FERGUSON, J.:--

It is proved beyond all cavil that the partnership was dissolved about the 1st of November, 1887. It is shewn that the plaintiffs never had any dealings with the firm during its existence, or with Sydney L. Coleman at all. It is shewn that the plaintiffs did not know at the time of the dealings that Sydney L. Coleman was or had been a member of the firm. It is not shewn that there was any "holding out" that he was a member of the firm at or previous to the time of the contract sued on. Even if there were, it was not such that it could have reached the public in Toronto, where the plaintiffs carried on their business and lived. It is not shewn that the plaintiffs directly or indirectly gave the credit to the defendant Sydney L. Coleman. The continuance of the firm name upon the sign after the dissolution is not, I think, proved. The plaintiffs' witnesses seemed to rely upon inference and something bordering upon imagination, and there is evidence to the contrary. It was not a sign disclosing the names of partners.

I think the cases *Carter v. Whalley*, 1 B. & Ad. 11, and *Heath v. Sansom*, 4 B. & Ad. 172, both referred to in the 4th ed. of Lindley on Partnership, pp. 405 and 406, shew that the plaintiffs cannot recover as against the defendant Sydney L. Coleman, though there was no notice of the dissolution, and the action as against this defendant Sydney L. Coleman must be dismissed with costs.

Order accordingly.

The plaintiffs moved against this judgment before the Divisional Court, asking to have judgment entered for them for the amount claimed, upon the ground that upon the facts it should have been held that Sydney L. Cole-

man was liable, because he had been a partner in the firm ^{Argument.} of Coleman Bros., and had given no notice of its dissolution, and held himself out to the world as a partner after the dissolution.

December 3, 1889. The motion was argued before the Divisional Court (ARMOUR, C. J., and STREET, J.)

Charles Millar, for the plaintiffs. There should be notice of the dissolution of a partnership: *Hendry v. Turner*, 32 Ch. D. 355; Lindley on Partnership, 5th ed., pp. 210, 214, 222. If a man is a known partner he must give notice if he wishes to escape liability: Bates on Partnership, ed. of 1888, secs. 610, 611, 618, 621; Wade on Notice, secs. 491, 502, 513, 530.

J. M. Clark, for the defendant Sydney L. Coleman. The plaintiffs, not having dealt with the firm before dissolution, had no right to notice of dissolution: *Scarf v. Jardine*, 7 App. Cas. 345; Story on Partnership, 6th ed., pp. 285, 286; Lindley on Partnership, 2nd Am. ed., pp. 213 *et seq.* It also appears by the evidence that the plaintiffs did know of the dissolution. It is quite clear that there was no holding out of Sydney L. Coleman as a partner. There was no registration of the partnership nor of the dissolution. I also rely upon *Newsome v. Coles*, 2 Campbell 617; and the cases cited by the trial Judge.

March 8, 1890. The judgment of the Divisional Court was delivered by

STREET, J.:—

The learned Judge before whom this action was tried appears to think that it would be unsafe to rely upon the memory of the traveller for the plaintiffs, who was the first witness called on their behalf, and that credit should only be given to his statements when they are otherwise corroborated, and I feel bound to adopt the same view in

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Street, J.

dealing with it. It is plain, however, that he went to the Windsor Hotel on the 25th January, 1888, to solicit an order for goods; that he entered this order in his own memorandum book as an order from Coleman Brothers; that he forwarded it to the plaintiffs as an order from that firm; that they sent the goods directed to Coleman Brothers and charged that firm in their books with the price, mentioning in their ledger that the firm was composed of Thos. G. Coleman and Sydney L. Coleman; and that this information had been supplied to them before they opened the account by one of the mercantile agencies to whom they applied for the purpose. The plaintiffs also produce a letter written to them by their traveller upon the same day as that on which he took the first order, dated at St. Mary's and written on paper with the heading "Windsor Hotel: Coleman Brothers, Proprietors." The traveller says that this paper was supplied to him on 25th January by one of the brothers at the hotel. Upon these facts, I think I am compelled to come to the conclusion that the plaintiffs gave the credit here to the firm of Coleman Brothers, believing it to be in existence, and to be composed of the two persons whose names were entered in their ledger. It is not disputed that that firm had been dissolved some weeks before the first order was given to the plaintiffs' traveller: and the sole question is whether Sydney L. Coleman, although not a partner at the time, had by doing something which he ought not to have done, or by omitting to do something which he ought to have done, justified the plaintiffs in their belief that the firm of Coleman Brothers still existed, and that he still continued a member of it.

The fact of the formation of the partnership, although not registered nor published by advertisement in the newspapers, was nevertheless made known to the public in various ways. The license to sell liquor was in the name of the firm, and was hung up in their bar-room, and we must assume that, in compliance with the Liquor License Act, it was "constantly and conspicuously exposed" there;

a bank account appears to have been opened in their firm name; a lamp hung outside the hotel, and on this the name of Coleman Brothers was painted, and printed letter-heads with the firm name upon them were prepared and supplied to guests. The two brothers were there attending on the guests and managing the business. I cannot find any statement as to the exact date when the partnership was formed, but as the license was issued to them as a firm, the firm had in all probability been formed as far back as the 1st of May, previous to the 1st of November, 1887, when it was dissolved, and had therefore been in existence for six months at least before the dissolution.

Judgment.

Street, J.

The acts done must all be taken to have been intended to apprise the public of the partnership that had been entered into, and they were in this manner informed that each of the partners was the accredited agent of the other for all purposes coming within the scope of the partnership business.

Upon the termination of the partnership, it was the duty of the retiring partner to take reasonable steps to inform the public that the implied agency, resulting from the existence of the partnership, had been terminated, and until that notice was in some way given, the public were justified in assuming that it still continued: *Scarf v. Jardine*, 7 App. Cas. at pp. 356-7. "As to persons who have been previously in the habit of dealing with the firm, it is requisite that actual notice should be brought home to the creditor, or at least that the credit should be given under circumstances from which actual notice may be inferred:" Story on Partnership, 6th ed., by Gray, p. 289. "But, as to persons who have had no previous dealings with the firm, and no knowledge who are or have been partners therein, a different rule may prevail. In such cases, unless the ostensible partner, who has retired, suffers his name still to appear as one of the firm, so as to mislead the public, (as by its being stated, and still remaining in the firm name), he will not be liable to mere strangers who have no knowledge of the persons who compose the firm,

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Street, J.

for the future debts and liabilities of the firm, notwithstanding his omission to give public notice of his retirement; for it cannot truly be said in such cases that any credit is given to the retiring partner by such strangers. * * *A fortiori*, if public notice has been given of his retirement, the retiring partner will not be liable to new creditors or customers, even if they have never seen such notice, or had any knowledge or information thereof; since the retiring partner has done all which can be reasonably required to give public notice of his withdrawal. What will amount to due and sufficient notice of the retirement of a partner is a question of fact, often of no small nicety and difficulty; for notice needs not be express; but it may be constructive, and be implied from circumstances. A notice in one of the public and regular newspapers of the city or county where the partnership business was carried on, is the usual mode of giving the information, and may in ordinary cases be quite sufficient. * * The weight of authority seems now to be that notice in one of the usual advertizing gazettes of the place where the business was carried on, when published in a fair and usual manner, is of itself notice of the fact to all persons who have not been previous dealers with the partnership:" Story on Partnership, 6th ed., by Gray, pp. 285-9. See also *Amidown v. Osgood*, 24 Vt. 278; *Pratt v. Page*, 32 Vt. 13; *Preston v. Foellinger*, 24 Fed. Rep. 680, and the notes to that case.

In Lindley on Partnership, 2nd Am. ed. at p. 213, the law is thus stated: "So if a partnership is dissolved, or one of the known members retires from the firm, until the dissolution or retirement is duly notified the power of each to bind the rest remains in full force, although as between the partners themselves a dissolution or a retirement is a revocation of the authority of each to act for the others. Thus, if a known partner retires, and no notice is given, he will be liable to be sued in respect of a promissory note made since his retirement by his late partner, even though the plaintiff had no dealings with the firm before the making of the note."

In the present case the plaintiffs before they delivered the goods in question became aware, by means of inquiries they made of persons whose business it was to collect such information for those requiring it, that a partnership had existed under the name of "Coleman Brothers," and that Sydney L. Coleman was one of the members of it, and they were at the same time informed that the partnership still existed. As a matter of fact it did not exist. On the 1st November previous to this time, the two brothers had verbally agreed that Sydney L. Coleman should retire from the partnership, but no public notice whatever was given of the fact. Sydney L. Coleman says that he told some of the storekeepers and all of his friends that he had "quit the firm," but he still continued to live at the hotel except when he was absent on his own business; the lamp with the firm name on it continued at the front door, though for how long is not stated; the license in the name of "Coleman Brothers" continued to hang in the bar-room, and the letter-paper informing the public that "Coleman Brothers" were the proprietors continued still to be handed to customers. How were the public who had been informed of the formation of the partnership expected to find out that it had been dissolved? In *Carter v. Whalley*, 1 B. & Ad. 11, relied on by the defendant, the defendant Saunders was a member of a firm called "The Plas Madoc Colliery Co.," but had retired from it before the giving of the note in question, without, however, giving public notice of the fact. The note was given in the name of the firm after he left for a debt incurred by the continuing partners, and it was held that he was not liable upon it, there being no proof that Saunders had ever dealt with the holder of the note as a partner, or had ever held himself out as one so publicly as that the plaintiff, the holder of the note, must have known it. In that case, however, the name of Saunders did not appear in the firm name at all, and there was no evidence that the holder of the note was aware that he had been a partner, or gave credit to him when he discounted it. On the other hand, the law is laid down

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more broadly than is necessary for the plaintiff in the present case in *Parkin v. Carruthers*, 3 Esp. 248, by LeBlanc, J., as follows: "The rule of law is clear, that where there is a partnership of any number of persons, if any change is made in the partnership, and no notice is given, any person dealing with the partnership, either before or after such change, has a right to call upon all the partners who at first composed the firm." But in that case the name of the partner who was held chargeable was continued in the partnership name after his retirement. The rule I gather from the cases is this: that in case a known member of a firm retires from it, and credit is afterwards given to the firm by a person who has had no previous dealings with it, but has become aware, as one of the public, that it existed, and has not become aware of his retirement, the retiring member is liable for the amount, unless he shews that he has given reasonable public notice of his retirement. I think that such notice was not given here, and that the defendant Sydney L. Coleman is liable.

It is not necessary to decide as to whether or not the continuance of the firm name upon the lamp and the other acts relied upon by the plaintiff as shewing that Sydney L. Coleman permitted his brother to continue to hold out to the public that the partnership still existed would have been sufficient to render him liable for debts subsequently contracted. That is a question which would have arisen had a notice been given by advertisement but had not come to the knowledge of the plaintiffs; and does not arise here. In *Standard Bank v. Dunham and Park*, 14 O. R. 67, the notes were signed "Dunham & Co.," and Park was sought to be made liable, although the notes were not signed until after the dissolution of the firm of Dunham & Co., of which he had been a member. It was held that he was not liable because the plaintiffs had no knowledge during the continuance of the partnership that he was a member and had no dealings with the firm whilst he was a member of it. The same result was arrived at by the Court of Appeal in the unreported case of *Danks v.*

Dunham, upon the same state of facts with regard to the same partnership of Dunham & Co.

Judgment.

Street, J.

The important point, however, in which those cases are to be distinguished from the present case, is, that the name of the partner, Park, who was sought to be made liable in those cases never appeared in the firm name at all, nor was he shewn to have been held out to the public as a partner during the actual life of the partnership. They were therefore strictly in this respect within the decision of *Carter v. Whalley*, 1 B. & Ad. 11, above referred to, and the language used in them is to be construed with reference to the facts of the case. In the present case the style of the firm informed the public that Sydney L. Coleman was a member of the firm, and credit was given to him by the plaintiffs before he had informed the public that he had ceased to be a member of it.

With regard to the orders given to the plaintiffs subsequent to the first, all of which were shipped and charged to Coleman Bros., I think the same rule must apply, and that being entitled at the time of the first order to believe, and believing, that the firm still existed, they continued entitled to entertain that belief until notice to the contrary was given them.

In my opinion, the defendant Sydney L. Coleman should be declared liable to pay this debt as a member of the firm of Coleman Bros., who are the defendants here, and judgment should be entered accordingly against the defendants for the amount claimed, with costs according to the High Court scale.

[QUEEN'S BENCH DIVISION.]

LAMB V. YOUNG.

Bankruptcy and insolvency—Insolvent debtor—Mortgage to creditor—Action by assignee under R. S. O. ch. 124, to set aside—Notice or knowledge of insolvency.

Held, following *Johnson v. Hope*, 17 A. R. 10, that an assignee for the benefit of creditors under R.S.O. ch. 124, suing to set aside as void a mortgage of real estate made by his assignor when in insolvent circumstances, to a creditor, must, in order to succeed, establish that the creditor knew at the time he took the mortgage that the mortgagor was insolvent and unable to pay his debts in full.

Statement.

THE plaintiff was assignee under R. S. O. ch. 124 of one Hough by virtue of an assignment made by Hough to him on the 15th February, 1889; and as such brought this action to set aside a mortgage on his real estate made by Hough to the defendant on the 22nd October, 1888, to secure the sum of \$1,000 and interest, as having been made when Hough was in insolvent circumstances, and so being void.

Hough was carrying on a store in the village of Tweed, and the defendant was a grocer at the village of Trenton, who had been furnishing him with goods, and to whom Hough had become indebted for goods to the amount of \$776 when this mortgage was given for \$1,000, the defendant agreeing to make up the difference by furnishing more goods, which he did.

The action was tried at the Chancery Sittings at Belleville in the Autumn of 1889 before BORD, C., who dismissed the action, on the ground that the plaintiff, on whom the onus was, had not satisfactorily established that Hough at the time he made the mortgage was in insolvent circumstances.

The plaintiff moved before the Divisional Court at the Hilary Sittings, 1890, to set aside this judgment and to enter judgment for the plaintiff.

February 12, 1890. The motion was argued before ARMOUR, C. J., and FALCONBRIDGE, J.

MacKelcan, Q. C., (with him *Mewburn*), for the plaintiff. Argument. The evidence shews that the debtor was insolvent when he made the mortgage. The finding of the learned Chancellor is wrong, and as it is merely an inference from the evidence, should be reversed : *The Glannibanta*, 1 P. D. at pp. 287-8.

Clute, Q. C., for the defendant. The evidence does not establish insolvency, and at all events the defendant had no notice or knowledge of the insolvency : *Johnson v. Hope*, 17 A. R. 10 ; *Burns v. Mackay*, 10 O. R. 167.

MacKelcan, in reply, referred to *Warnock v. Kloepper*, 14 O. R. 288 ; 15 A. R. 324 ; *River Stave Co. v. Sill*, 12 O. R. 557 ; *Stoddart v. Wilson*, 16 O. R. 17.

March 8, 1890. ARMOUR, C. J. :—

If we arrived at a different conclusion upon the facts from that arrived at by the Chancellor, and found that the debtor Hough at the time he made the mortgage to the defendant was in insolvent circumstances and unable to pay his debts in full, the plaintiff would still have to get over the difficulty that he did not establish that the defendant knew at the time he took the mortgage that Hough was insolvent and unable to pay his debts in full ; and this it was incumbent on him to do according to the recent amendment of the Act R. S. O. ch. 124 made by the Court of Appeal in *Johnson v. Hope*.

There was no evidence to shew such knowledge, but all the evidence on the subject was wholly against it.

The motion must be dismissed with costs.

FALCONBRIDGE, J. :—

I agree that under *Johnson v. Hope* the motion must be dismissed with costs.

[CHANCERY DIVISION.]

THE LINCOLN PAPER MILLS COMPANY V. THE ST.
CATHARINES AND NIAGARA CENTRAL RAILWAY COMPANY.

Railways and Railway Companies—Default in payment of compensation moneys—Rights of land-owners—Injunction—Order for possession—Vendor's lien—Order for sale—Remedies.

Held, that where a railway company had failed to pay the balance of compensation awarded to land-owners in accordance with a judgment obtained for the same, although it had entered into possession and was operating its railway over the lands, the land-owners were entitled to an order declaring them to have a vendor's lien on the lands for the amount, with such provisions as were necessary to realize by means of a sale; but they were not entitled to an injunction to restrain the defendants from operating the railway on the lands, nor to an order for delivery up of possession.

Allgood v. Merrybent and Darlington R. W. Co., 33 Ch. D. 571, distinguished.

Statement.

THIS was a motion for an injunction and an order for possession made after judgment obtained in this action, which was brought by the Lincoln Paper Mills Company against the above railway company to recover payment of a sum of \$1252.08 and interest from April 5th, 1889, the balance of compensation due to them from the defendants under the terms of a certain award made under the Railway Act, (and in accordance with the terms of an agreement made between the plaintiffs and the defendants, dated September 27th, 1889,) bearing date January 26th, 1888, in favour of the plaintiffs, and against the defendants, in regard to certain lands taken by the defendants for their railway from the plaintiffs as well as in regard to compensation due the plaintiffs from the defendants for injuriously affecting certain other lands of the plaintiffs; and in default the plaintiffs prayed that the defendants might be ordered to yield up and deliver to the plaintiffs peaceable possession, together with the legal estate of the land so expropriated by them, and in which their track at the time of action brought was, and on which track the defendants were operating their railway.

It appeared that the defendants had entered into pos-^{Statement.}session of the lands so required for their way about October 11th, 1887, under the order of the Court, paying \$1200 into the Bank of Commerce to the joint credit of the parties to this action as provided by R. S. C. ch. 109.

By their statement of defence, delivered on October 14th, 1889, the defendants admitted that they were indebted to the plaintiffs in the sum claimed, and that the plaintiffs were entitled to judgment for recovery of the said sum of money, but submitted that they were not entitled to the alternative relief claimed nor to any other relief than judgment for the recovery of the amount.

The present motion was made pursuant to leave reserved in the judgment.

The judgment was in favour of the plaintiffs, and was for \$1408 in addition to the \$1200 that was formerly deposited by the defendants and was applied on account of the amount due for compensation.

The award itself, which was made on January 26th, 1888, was for \$1500.

The costs and interest made up the amounts of the \$1200 and the \$1408.

Of the \$1500 awarded, \$1000 was for damages, and \$500 for value of the land taken.

The motion came on for argument on February 11th, 1890, before FERGUSON, J.

McClive for the plaintiffs. The question between the parties is as to whether this character of remedy can be had under all the circumstances: *Allgood v. Merrybent and Darlington R. W. Co.*, 33 Ch. D. 571.

[FERGUSON, J.—I will first hear Mr. *Aylesworth*, as to the general aspect of his objections or defence.]

Aylesworth, Q. C., for the defendants. The defendants pleaded admitting liability for the money, but saying that they are not liable to be evicted. Ejectment or injunction is not the proper relief. This could not possibly have been ordered by the Chancellor at the hearing. All the plain-

Argument.

tiffs are now entitled to is the declaration of a vendor's lien and the usual remedy for it, the judgment or decree for sale of the property : *Slater v. Canada Central R. W. Co.*, 25 Gr. 363. The lien is the only remedy that can be had. The English cases all point in the same direction. What the plaintiffs want is really a rescission of the contract, but this they cannot have : *Kerr on Injunctions*, 3rd ed. p. 155. There was here a substantial part payment : *Capps v. Norwich and Spalding R. W. Co.*, 9 Jur. N. S. 635. The *Allgood Case* is a peculiar one. All the cases down to the year 1880 are collected in the *Law Reports Digest 1865 to 1880*, p. 2161, under the heading "Lands Clauses Act. Vendor's Lien." See also *Lycett v. Stafford and Uttoxeter R. W. Co.*, 13 Eq. 261. All that can now be given is a declaration of lien, an order for payment by a certain day, and in default of payment a sale of the lands, and application of the purchase money, and in case of a deficit, execution against the defendants, or in case of a surplus, payment of such surplus to the defendants.

McClive, contra. This case differs from the *Slater Case*, *supra*, for there it does not appear that the land would not bring the money on sale : *Wing v. Tottenham, &c., R. W. Co.*, L. R. 3 Ch. 740 ; *Heriot v. London, Chatham, and Dover R. W. Co.*, 16 L. T. N. S. 473.

February 11th, 1890. FERGUSON, J.:—

The motion, as shewn by the notice of the same, is for an order declaring that the plaintiffs are entitled to a lien upon the lands in respect of the balance of the purchase money, interest and costs due thereon under the judgment pronounced on November 30th, last, which is the sum of \$1408, and for an injunction restraining the defendants from running or causing or permitting to be run on the lands in question, or any part thereof, any train, engine, carriage, &c., and from continuing or being in possession of or using the lands or any part thereof until further order, and that the plaintiffs may be put into possession, &c. The

claim for the injunction and the possession of the lands is grounded upon the default of the defendants in not paying the above mentioned sum by the time mentioned in the judgment for the payment of it, or since. If this sum were paid the present controversy would end. Owing to the form as well as the spirit of the judgment, I have I think on this motion the same jurisdiction over the subject matter and the rights of the parties as that possessed by the learned Judge at the trial of the action. This had to be conceded by counsel.

Judgment.
Ferguson, J.

Counsel for the defendants says that while he does not admit anything against his clients, he cannot successfully contend, or contend with hope of success, that the plaintiffs are not entitled to an order declaring the lien and giving all the usual remedies of a vendor upon or in respect of his lien for unpaid purchase money, but he contends that the plaintiffs are not entitled to the injunction asked nor to the possession of the lands that have been expropriated.

Counsel for the plaintiffs contend (according to his motion) that the plaintiffs are entitled to the injunction and the possession, as well as the order in respect to the lien.

The question for me is: Are the plaintiffs entitled to the injunction and possession?

In the course of the proceedings for the expropriation of the lands an estimated sum of \$1200, was deposited and this with interest the plaintiffs have received in part satisfaction. The value finally fixed by the award was \$1500. The present value unpaid is largely composed of interest and costs.

So far as this motion is for possession of the lands, the subject is very fully considered by the late Chief Justice, then the Chancellor, in the case, *Slater v. Canada Central R. W. Co.*, 25 Gr. 363, in which the learned Judge decided that the Court would not order possession to be restored in case of default in payment of compensation, saying that the case *Wing v. Tottenham, &c., R. W. Co.*, L. R. 3 Ch. 740, settled the question that where there is a vendor's lien parties are entitled to enforce it in the way any other lien

Judgment. can be enforced, that is, by a sale. The learned Judge
Ferguson, J. then refers to that as being the proper remedy, and he pronounced a decree for payment within one month, or in default that the land be sold.

As to the injunction, there is a considerable number of cases in the English Reports, which are of comparatively recent date. Many of these are collected in the L. R. Dig., 1865-1880, commencing at page or rather column 2160.

In the case *Munns v. Isle of Wight R. W. Co.*, L. R. 5 Ch. 414, it was decided that an injunction is not the proper remedy, as it would make the land useless to both parties. See the reasoning of Lord Justice Giffard at p. 419. There the case, *Cosens v. Bognor R. W. Co.*, L. R. 1 Ch. 594, is amongst other cases referred to, and it is remarked that Lord Justice Turner had in that case expressed his opinion that to appoint a receiver was the proper course. By referring to the case one sees that the judgments are very short, Knight Bruce, L. J., saying simply that the order (the one appealed from) might not be according to the ordinary practice of the Court, nor was the case ordinary.

He thought that the Court was not exceeding its power in allowing the order for the injunction to stand. The two Judges were of different opinions, and the order was allowed to stand. In the case *Lycett v. Stafford and Uttoxeter R. W. Co.*, L. R. 13 Eq. 261, it is decided that the Court will not in such a case grant the injunction, the learned Judge following Lord Justice Giffard in *Munns v. Isle of Wight R. W. Co.*, *supra*. I think I need not refer specially to any more of the English authorities. It seems to me that down to a late case, to which I will presently refer, they are in the main, if not altogether, against the granting of an injunction in cases such as the present case is.

The case to which I allude is *Allgood v. Merrybent and Darlington R. W. Co.*, 33 Ch. D. 571. This seems to me to be the authority relied upon by the plaintiffs in regard to the branch of the motion respecting the injunction and the possession. That case is however, I think, materially different. Thirteen years had passed away after the price

had been agreed upon. The company had proved unsuccessful and an Act of Parliament had been passed authorizing an abandonment by the company. The company was, in liquidation and utterly insolvent. No part of the purchase money had been paid, although the suits were commenced ten years after this company had obtained possession and the judgments were by consent.

Judgment.

Ferguson, J.

It was shewn that the lands were wholly unsaleable. It was argued by the vendors that they were dealing with an insolvent company, and that an order for sale would put them to unnecessary expense, &c. The learned Judge said, at p. 574: "There are two remedies, the one is to force a sale and the other is to ask for a rescission of the contract and for possession." Then, as I have said, no part of the compensation had been paid.

I may say that I do not fully understand the learned Judge when he says there is nothing in the case before Lord Justice Giffard, *Munns v. Isle of Wight R. W. Co.*, L. R. 5 Ch. 414, to conflict with what he was stating. Lord Justice Giffard did say, at p. 419, "I shall in this case discharge the order for an injunction, which I consider inconsistent with the authorities, and in some measure inconsistent with principle."

It has not been shewn that the defendants are insolvent. I think the plaintiffs cannot in the face of what appears and has heretofore appeared, say that the land is valueless and, as will readily be seen, there are many other differences between the present case and *Allgood v. Merrybent, &c., R. W. Co.*, 33 Ch. D. 571. In my opinion the great weight of recent English authority is against the granting of the injunction or the order for possession that is asked, that the case in our own Court, reported in 25 Gr., before referred to, accords with this weight of authority, and I think that the case *Allgood v. Merrybent, &c., Co.*, is distinguishable.

I am therefore of opinion that the plaintiffs are not entitled to the injunction or the order for the possession. It is, however, conceded and I think rightly so, that the plaintiffs

Judgment. are entitled to the order declaring their lien as they ask.
Ferguson, J. This order may go and it may contain all such provisions as are necessary to realize by a sale of the lands. The time to be allowed will be one month. I think it proper to confine the refusal of the order for the injunction and that for the possession to the present state of facts and condition of the proceedings, so that the plaintiffs may not be precluded or be in danger of being precluded from moving for these remedies or either of them should a different condition of facts arise and they should be advised so to do. I think the plaintiffs are nevertheless entitled to their costs as against the defendants, as the defendants are in default and the judgment clearly contemplates a motion for relief in such event.

Order accordingly.

A. H. F. L.

[CHANCERY DIVISION.]

RE IRON CLAY BRICK MANUFACTURING COMPANY.

TURNER'S CASE.

Company—Director—Fiduciary capacity—Purchase by director of property of company sold under mortgage—Liability to account—Breach of trust—Winding-up Act, Dominion and Provincial—Constitutional law—R. S. O. ch. 129, sec. 83—R. S. O. 1887, ch. 183.

A director of a joint stock company, having a judgment and execution of his own against the property of the company acting in good faith, purchased the same at a sale by mortgagees, under a power of sale for \$8,400, and sold it in the following year for \$23,000 :—

Held, in winding-up proceedings, that he could not purchase for his own benefit, but held the land as trustee for the company and was accountable for any profit received on a re-sale, and by reason of his refusing to pay over or account for such profits, and in fact by his appearing as a bidder at the sale and so damping the bidding, was guilty of a breach of trust within R. S. C. ch. 129, sec. 83.

Semble. Notwithstanding the Act, 52 Vic. ch. 32 (D.), amending the Dominion Winding-up Act, the Ontario Winding-up Act, R. S. O. 1887, ch. 183, does not apply to a company incorporated in Ontario where application to wind up is made on the ground of insolvency, because local legislatures have no jurisdiction in matters of bankruptcy or insolvency.

THIS was an appeal from a decision of the Master in *Statement*. Ordinary, made in the matter of the winding-up proceedings of the Iron Clay Brick Manufacturing Company, under circumstances sufficiently set out in the reasons of the learned Master, which were as follows : (a)

THE MASTER IN ORDINARY :—This is an application by the liquidator to have the respondent declared a trustee for the company in respect of certain lands, purchased by him in 1888, while a director and treasurer of the company.

The company was incorporated in 1884, for the manufacture from clay, stone and other materials, and for the sale of paving stones, or blocks, bricks, pipes, tiles, statuary, and all other like articles ; and in March, 1886, it acquired the property in question for \$14,100, for the purposes of its business, assuming in the purchase an existing mortgage for \$4,700.

The company got into financial difficulties and paid nothing on the mortgage ; and in 1888 the mortgagees, under a power of sale, sold the lands at public auction, when the respondent became the purchaser for \$8,400, he having at the same time a judgment and execution against the company for \$3,400. In February or March, 1889, he was offered \$23,000 for the property.

(a) These reasons of the learned Master are more shortly reported, 9 C. L. T. 461.

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Master in
Ordinary.

The liquidator contends that by virtue of his position as director and treasurer of the company, he could not purchase for his own benefit, and that he holds the lands as a trustee for the company. No imputation is made upon the conduct of the respondent, but it is alleged that he wrongfully claims to hold the property as against the company and its creditors.

The chief ground urged by counsel for the liquidator is, that on the ground of public policy a director should not be allowed to acquire the corporate property for his own benefit, for the reasons that he and his co-directors have the possession and control of that property, and acquire their knowledge of its situation and advantages by virtue of their position as directors; and that they are bound to use it, and if need be, to sell it, for the benefit of the shareholders.

There is no statutory law prohibiting directors from purchasing the property of their company, the law controlling such purchases is a rule of equity, classed by jurists and text writers as a law of public policy.

The law of public policy is not capable of exact definition, but I think it may come within Austin's references to "a rule morally sanctioned, or a rule of positive or actual morality," which may become binding if affirmed by legislative action; or become "converted into a law after the judicial fashion." It is sometimes deemed a law emanating from custom, or *jus moribus constitutum*; and though established by the judicial process as a rule of judiciary law, it is not less a positive law than if it were enforced by a statute. One branch of that law relates to the position and duties of persons holding a fiduciary relation towards others, and it affirms that such fiduciary relationship debars the person holding it from gaining a personal benefit at the expense, or to the detriment, of the persons in respect of whom such fiduciary relationship exists.

The position of directors of a company has been variously defined as that of "trustees," "*quasi* trustees," or "managing partners or agents." As said by Lord Romilly, M. R., in *York and North Midland R. W. Co. v. Hudson*, 16 Beav. 485, at p. 491, "the directors are persons selected to manage the affairs of the company for the benefit of the shareholders; it is an office of trust, which if they undertake, it is their duty to perform fully and entirely." Sir George Jessel, M. R., in *re Forest of Dean Coal Mining Co.*, 10 Ch. D. 450, says at p. 451: "Directors have sometimes been called trustees or commercial trustees, and sometimes they have been called managing partners. It does not much matter what you call them so long as you understand what their true position is, which is that they are really commercial men managing a trading concern for the benefit of themselves and of all the other shareholders in it." Mr. Justice Lindley in his recent work on the *Law of Companies*, (1889), also gives a definition, and its effect thus, (p. 364): "Directors are not only agents but to a certain extent trustees. * * The property of the company may not be legally vested in the directors, but it is practically under their control, and they are bound to employ it for the purposes for which it was entrusted to them; * * and any exercise of such powers for other purposes is a breach of trust, and will be treated accordingly. It follows as a necessary consequence, that directors of a company are bound to

account to the company for all profits made by themselves by the employment of the assets of the company, and for all profits made by them at the expense of the company, unless they can show that the company, with a full knowledge of all the facts, have agreed to allow them to retain such profits for their own benefit."

The Courts of the United States recognize the same law, and place directors of joint stock companies under the rule of public policy relating to fiduciary relations.

In *Bradley v. Farwell*, 1 Holmes C. C. 433, it was held that as directors are intrusted with the general management and control of the affairs and property of the corporation, this management and control must be exercised by them in their character of trustees, and subject to the responsibilities, under the law of trusts, imposed upon those who have assumed and are consequently under obligation faithfully to execute a trust. The fact that the directors in dealing with a trust property have secured to themselves a benefit or advantage over the creditors, or a benefit or advantage to themselves as creditors, taints the transaction, and invokes the aid of a Court of Equity to the right execution of the trust.

In *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, the Supreme Court also placed directors under the rule relating to fiduciary relations: "A director of a joint stock corporation occupies one of those fiduciary relations where his dealings with the subject matter of his trust or agency is viewed with jealousy by the Courts, and may be set aside on slight grounds. This is a doctrine founded on the soundest morality, and which has received the clearest recognition in this Court and in others."

The reason of the rule is given in *Bradley v. Farwell*, *supra*: "It is not that in particular instances the sale or the purchase may not be reasonable; but to avoid temptation, the agent to sell is disqualified from purchasing, and the agent to purchase, from selling. In all such contracts the sales or the purchases may be set aside by him for whom such agent is acting. The *cestui que trust* may confirm all such sales or purchases if he deems it for his interest. The affirmance or disaffirmance rests with him; and the trustee when buying trust property from, or selling it to, himself, must assume the risk of having his contracts set aside if the *cestui que trust* is dissatisfied with his action."

Suits like the present against a trustee or agent, are not actions for relief on the ground of fraud, but for a judicial declaration and enforcement of an implied or constructive trust: *Covington, &c., R. W. Co. v. Bowler*, 9 Bush 468.

Mr. Robinson has furnished me with two authorities from the jurisprudence of the United States, directly bearing on the case of directors purchasing their company's property at auction or other sales. In *Hoyle v. Plattsburgh and Montreal R. W. Co.*, 54 N. Y. 314, a director of the company purchased the rolling stock of the railroad at a sale under an execution against the company. The Court held that from his position of director arose the duty of managing and conducting the affairs of the company to the best advantage, and the obligation not to let the private interests of any individual

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director compete with his duty towards the corporation, and that he could not, therefore, become the purchaser of the property of the corporation, except subject to its right to elect to disaffirm the sale and demand a re-sale. And in giving judgment, the Court said: "As director it was his duty to prevent a sale if possible; and if not, then to endeavour to have the property produce the highest price; and in order to the attainment of these objects to use the knowledge he had derived from the confidence reposed in him as director. As purchaser, on the other hand, it was his interest to pay as little as possible, and to use his special knowledge for his own advantage."

No case directly in point has been cited from the English reports; but in our Courts the case of *King v. Keating*, 12 Gr. 29, may be cited as showing that even in the case of sales not controlled by the trustee, as in the case of a sheriff's sale, *Mowat v. C.*, held that a purchase by a trustee of his *cestui que trust's* property must enure for the benefit of his *cestui que trust*.

The Irish case of *Gabbett v. Lawder*, 11 L. R. Ir. 295, is to the same effect. The defendant was the administrator of one Lawder, who held a leasehold interest in certain Church lands. The reversion in fee was directed to be sold, and was offered to the defendant as the immediate tenant; he declined to purchase at the price named, and the reversion was then put up for sale by public auction. The defendant attended the auction sale, and purchased the property at a less price than that previously asked.

The Court held that his purchase was for the benefit of the estate. In giving judgment, the Vice-Chancellor said: "If his position could have caused, or even contributed to his obtaining the advantage, it is, in my opinion, enough; and the Court will not undertake the difficult and often impossible task of investigating the motives of the parties to the transaction."

The American case of *Covington, &c., R. W. Co. v. Bowler*, 9 Bush, 468, is to the same effect. There a director of the company purchased the railroad at a judicial sale ordered by the Court. It was held that as he had not obtained the consent of the company, nor the permission of the Chancellor of the Court, by whom the sale was decreed, his purchase was within the rule prohibiting trustees from purchasing the trust property for their own benefit.

These cases appear to be applicable to the case before me, and I, therefore, follow them and adjudge that the respondent is a trustee for the company of the lands in question; but that he is entitled to claim as against the said lands all charges and expenses properly claimable by him in these proceedings.

Costs to follow the result, including the costs in *Martens v. Turner*. Subsequent costs are reserved.

The appeal came on for argument on November 23rd 1889, before ROBERTSON, J.

W. Cassels, Q. C., and *D. Macdonald*, for Turner. We ^{Argument.} rely upon *In re Compagnie Générale de Bellegarde*, *Campbell's Case*, 4 Ch. D. 471; a case which is not cited in the Master's judgment. Turner has not got moneys of the company. He has not been guilty of a misfeasance or breach of trust. The case does not come within sec. 83 of the Winding-up Act, R. S. C. ch. 129, at all. But the Master is also in error in holding that under no circumstances can a director hold for his own benefit. In all cases there is some particular circumstance. Here the circumstances were the other way. There had been no meeting of the company for two years, and the sale was brought on by the company itself. The sale is not attacked on any ground.

Robinson, Q. C., and *Le Vescomte*, for the liquidator. Section 83 covers many more things than misfeasance or breach of trust. Turner becomes accountable for moneys of the company under that section. He is responsible to the company for profits as director. The broad principle is unassailable. He was a director; the property was the company's; he made a profit. These three things are undenied. It comes within the broad principle. *Campbell's Case*, 4 Ch. D. 471, is distinguishable. The point there was that there was no profit. A director is a person to whom the rules governing the conduct of persons in a fiduciary position apply. He is not technically a trustee. There is no case in which directors have been allowed to retain profits made out of the property of the company purchased by them. So long as a director retains office he is subject to obligations. If he wished to purchase property, to protect himself, he should have resigned. The duty of a director is to guard the interests of the company. His duty as purchaser was inconsistent with this. His duty as director would have been to take steps to set aside this sale. We may refer to *Mooney v. Smith*, 17 O. R. 644. Turner's bidding at the sale would discourage bidders. They would think he was trying to buy it in for the company. That consideration is adverted to in *Fox v. Mackreth*, W. & T. L. C. 6th ed., vol. 1, p. 141; see especially

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pp. 176, 180, 191, 191, 197-8, 203, 207, 209. The law is epitomized in *Tylce v. The Queen*, 7 S. C. R. at p. 683. See also *Hoyle v. Plattsburgh and Montreal R. W. Co.*, 54 N. Y. 314, which is the strongest case we have found. Another strong case is *Covington, &c., R. W. Co. v. Bowler*, 9 Bush. 468. Also *Greenlaw v. King*, 3 Beav. 49, 61; *Lewin on Trusts*, 8th ed., vol. 1, p. 279; *In re Cameron*, 14 Gr. 612; *In re Faure v. Electric Accumulator Co.*, 40 Ch. D. 141; *Lindley on Companies*, 5th ed., at p. 368.

Cassels, in reply. Sections 11 and 13 of R. S. O., 1887, ch. 156, may be referred to as to the position of directors. In this particular case from 1886 the company were not a company. It was merely a technical directorship from that time out. In *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587, the position of directors is defined. The relation of trustee and *cestui que trust* is different altogether. A director can buy, though the Court may on slight grounds set aside the sale. All the cases say is, that his actions will be viewed with jealousy.

Robinson. Under section 77 of the Winding-up Act, R. S. C. ch. 129, the Master is Judge. There is no appeal except to the Court of Appeal. See, also, 52 Vic. ch. 32, (D). This answers the objection as to section 83.

December 23rd, 1889. ROBERTSON, J.:—

This is an appeal from the report of the Master in Ordinary adjudging that Mr. Turner is a trustee for the company of certain lands in which the company had the equity of redemption, and which he purchased at a sale under a power contained in a mortgage; the said Turner at the time of the said purchase being a director of the company.

[The learned Judge stated the facts set out in the Master's finding and continued:]

The liquidator claims that, by virtue of his position as director and treasurer of the company, he could not purchase for his own benefit; and that he holds the land as

a trustee for the company. No imputation is made upon the conduct of the respondent, but it is alleged that he wrongfully claims to hold the property for his own benefit as against the company and its creditors. The counsel for the liquidator contends that, on the ground of public policy, a director should not be allowed to acquire the corporate property for his own benefit, for the reasons that he and his co-directors have the possession and control of that property and acquire their knowledge of its situation and advantages by virtue of their position as directors; and that they are bound to use it, and, if need be, to sell it for the benefit of the shareholders.

Mr. Cassels took the objection before me that "The Winding-up Act," R. S. C. ch. 129, does not apply to a joint stock company formed under "The Ontario Joint Stock Companies Letters Patent Act," R. S. O., 1887, ch. 157, which is the case of this company now being wound up; there being a local Winding-up Act, R. S. O., 1887 ch. 183, and cites the amending Act, 52 Vic. ch. 32, (D.) sec. 3, which declares that this Act only applies to corporations incorporated by or under the authority of an Act of the Parliament of Canada, or by or under the authority of any Act of the late Province of Canada, or of the Provinces of *Nova Scotia, New Brunswick, Prince Edward Island, or British Columbia*, and whose incorporation and the affairs whereof are subject to the Legislative authority of the Parliament of Canada. This amending Act, was passed on April 16th, 1889. The order in this matter was made before that Act became law—namely, on February 20th, 1889. I think, therefore, even if there were no other reason, the objection must fail. In *Re Clarke and Union Fire Ins. Co.*, 16 A. R. 161, the decision of BOYD, C., that the Dominion Winding-up Act is *intra vires* the Dominion Parliament, and applies to a company incorporated by the Provincial Legislature, was affirmed. This, however, was conceded by Mr. Cassels in so far as former legislation was concerned, but he contended that the amending Act was passed to meet the case now put by him.

Judgment.
Robertson, J.

Judgment. The local Act, in my judgment, does not apply, when Robertson, J. the application for "winding-up" is made by a creditor on the grounds that the company is insolvent, as was the case here. The local Legislature having no jurisdiction in matters of insolvency, whereas matters of "insolvency" are wholly within and "subject to the legislative authority of the Parliament of Canada."

Another ground of appeal is, that the Master in Ordinary was wrong in holding that the appellant Turner, although a director of the company at the time of the purchase of the land in question, could not purchase for his own benefit; that the purchase by a director is not *per se* void; nor is he trustee in the ordinary sense. There must be something in the nature of a breach of trust, and sec. 83 of the Winding-up Act, R. S. C. ch. 129, is referred to; there must be a misapplication, &c. Nor does the mere fact of his buying make him guilty of a breach of trust. This company was promoted by a Mr. Von Heimrod, who had lands which could be utilized for making bricks, &c. The company bought these lands at \$500 per acre, subject to a mortgage thereon, which the company was to assume and pay off out of the purchase money. Von Heimrod took stock for a large amount. The propriety of the transaction so far as the purchase by Turner is concerned, is not questioned.

At a special meeting of the shareholders, held on November 30th, 1886, at which it was concluded that the company could not raise the necessary funds to meet their liabilities, Mr. Turner, who was a holder of promissory notes against the company for a considerable amount, stated that he purposed entering suits against the company upon the notes held by him, and solicitors were then instructed by resolution to accept service of process for the company. The action was proceeded with, and Mr. Turner in due course recovered judgment, and placed *fi. fa's.* against goods and lands in the hands of the sheriff, and was proceeding to sell the equity of redemption of the company in the lands, but at the request of the directors

he permitted the sale to stand over from time to time in order to give the company another opportunity to raise the money to pay his claim, in which however the company failed. And these circumstances are urged to shew that Mr. Turner acted in good faith in his endeavour to assist the company.

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Robertson, J.

After this, the mortgagees took steps to realize on their mortgage, and Mr. Turner thereupon allowed his *fi. fa.* lands to stand again at the request of the company, the property being sold under the power contained in their mortgage on July 2nd, 1888. It is admitted that every thing was done on the part of the mortgagees to get the highest price; and the Master has so found. Mr. Turner at this mortgage sale became the purchaser at about \$8,400, and afterwards sold for \$23,000; his judgment was for about \$3,400, and his mortgage claim about \$5,000, so that he got the property for the amount due on the mortgage and his own claim.

Mr. Cassels also contended that if it can be satisfactorily established that the property when purchased by Mr. Turner, brought its then full market value, the claim of the liquidator must fail; and in order to ascertain that fact, there should be a reference back.

I will consider this last contention first; and in doing so, it is only necessary to refer to a very late case, which, in my judgment, not only covers this point, but goes to maintain the position taken by the Master on the general question. In *Eden v. Ridsdale's Railway Lamp and Lighting Co.*, 23 Q. B. D. 368, the Court of Appeal in England decided that a gift by a promoter of a company to a director, under the circumstances therein mentioned, *must be accounted for by the director to the company, and the company has the option of claiming the thing given, or its highest value whilst held by the director.* Applying that case to this, the company now say the *highest value* of this property whilst it was in Mr. Turner's hands, is found to be \$23,000—he paid \$8,400 for it. We claim the balance as forfeit. I am of opinion the company, or its creditors

Judgment. can do so, and therefore there need be no reference back
Robertson, J. to ascertain what the value was at the time of purchase
by Mr. Turner.

Then as to the objection that Mr. Turner although a director at the time of the purchase, was not a trustee, and that there must be something done in the nature of a breach of trust, a misapplication, or a retention in his own hands of the moneys or property of the company within the purview of the 83rd sec. of the Winding-up Act, to make him answerable, &c. That section of the statute declares, "When, in the course of the winding-up of the business of a company under this Act, it appears that any past or present director, manager, &c., of such company has misapplied or retained in his hands, or *become liable or accountable for* any moneys of the company, or been guilty of any misfeasance, or *breach of trust* in relation to the company, the Court may, on the application of any liquidator, &c., * * examine into the conduct of such director, &c., and compel him to repay any moneys so misapplied or retained, or *for which he has become liable or accountable*, &c., or to contribute such sum of money to the assets of the company by way of compensation in respect to such misapplication, *retention*, misfeasance, or *breach of trust*, as the Court thinks fit."

Now it is contended on the part of the liquidator that in this case, by reason of Mr. Turner having become the purchaser of the lands in question, which certainly were the lands of the company subject to the mortgage, he, Mr. Turner, then being a director of the company, has *become liable or accountable* for whatever profits he may have received on a sale by him of these lands; and that by reason of his refusing to pay over or to account for such profits, he has been properly adjudged guilty of a "breach of trust," and after full consideration of the point, I think that contention is well supported, and is within the 83rd section.

As to whether Mr. Turner is a trustee in the ordinary legal acceptance of the term, this is to my mind of little consequence. Learned Judges before this have treated of

that in numerous reported cases, but whether he was a trustee or an agent, or whatever it may please any one to call the position occupied by Mr. Turner in this company, it is clear he was a director, and his duty as such made it incumbent on him to give his whole ability, business knowledge, exertion, and attention, to the best interests of the shareholders, who had placed him in that position, when these interests were involved ; and it was incumbent upon him to assume no part which would be inconsistent with a proper, free, and independent discharge of his duties in that respect ; he could not serve two masters—himself individually or personally, and the shareholders of the company, whose agent he was—the interest of the one, and his duty to the company or its shareholders. were conflicting ; and although I have not the slightest doubt, and that fact is admitted on all sides, that so far as Mr. Turner's own mind was concerned, he acted in perfect good faith, and he had no idea that he was in any way infringing upon the rights of others ; yet the very fact of his appearing as a bidder at the sale, the public knowing that he was a director of the company whose lands were being sold, would have the effect of damping the bidding, and the chances of a good fair price being obtained were greatly lessened by that fact, and in that respect there was a breach of trust. No one standing or occupying a fiduciary relationship can be permitted to do an act on his own personal behalf, which might or could be construed to be inconsistent with the fiduciary character which he held at the time.

I have not over-looked the case cited, and relied upon by Mr. Cassels : *In re Compagnie Générale de Bellegrade, Campbell's Case*, 4 Ch. D. 471 ; but I do not think it applies in principle, nor could I give effect to it even if I thought it could be so construed, against all the other cases which are to be found in the books and cited by Mr. Robinson, which meet the facts, circumstances, and principles involved in the case now before me. I am, therefore, of opinion that the Master in Ordinary was right, and the appeal must be dismissed with costs.

[QUEEN'S BENCH DIVISION.]

BROOKE ET AL. V. BROWN.

*Trusts and trustees—Provisions of will—Implied powers of trustees—
Reasonable building lease—Specific performance of agreement for.*

The plaintiffs were trustees under a will, holding the legal estate in the property devised and bequeathed, in trust to maintain themselves and their children, with remainder over to the children upon the death of themselves; with power to absolutely convey the property and to exclude any child from participating in the remainder:—

Held, that the plaintiffs had implied power to make all reasonable leases. The plaintiffs made an agreement for a building lease to the defendant of part of the trust estate for twenty-one years, with a provision for compensation to the defendant at the end of the term for his improvements, and the draft lease settled provided that the plaintiffs should at the end of the term pay for such improvements or renew the lease for a further term of twenty-one years:—

Held, that the provisions of the agreement and lease were reasonable, and bound the trust estate, and that the plaintiffs were entitled to specific performance.

Statement.

THIS was an action brought to compel the defendant specifically to perform the following agreement:—

“I hereby agree to lease from John Edmund Brooke and Betsey Johnston Brooke (the plaintiffs), of the town of Chatham, in the county of Kent, trustees under the will of Daniel Brooke, senior, formerly of Toronto, deceased, the premises at present known as numbers 16, 18, and 20 Adelaide street west, Toronto, lately occupied by Barnes Bros. as livery and sale stables, for a term of twenty-one years, yielding and paying yearly the sum of \$1,425 and all taxes for the first ten years, and the sum of \$1,800 yearly and all taxes for the remaining eleven years: the premises to be put in a fair state of repair, so as to make them wind and water tight: the above named trustees to furnish the lumber and to pay for one-half the labour, and I to pay for the other half of the labour. I also agree within three or four years from the date of my lease to erect or cause to be erected on the said premises good and substantial brick stables to cost not less than \$8,000. The lease to contain the ordinary statutory covenants and a clause for the disposition of the said buildings at a valua-

tion to be decided by arbitration at the end of the term." Statement. This was dated the 6th October, 1888, and was signed by Charles Brown, the defendant, and by the trustees.

A lease was settled between the parties pursuant to the agreement, which provided that the lessors, as trustees, should have the option at the end of the first term of twenty-one years of paying for the buildings or renewing the lease for the further term of twenty-one years, at a rent to be fixed by arbitration. A covenant by the plaintiffs, as trustees, for quiet enjoyment was inserted.

It was agreed that if the plaintiffs had the power (which the defendant denied) to make such an agreement and lease, and if the defendant was bound to specifically perform the agreement, the lease should be in the terms as settled.

The defendant set up that the plaintiffs had not the power as trustees under the will of Daniel Brooke, senior, to make the agreement or lease.

The trial of the action was begun at the assizes at Chatham in the autumn of 1889, before ROSE, J., without a jury.

The material parts of the will were as follows: "I will, devise, and bequeath unto my son John Edmund Brooke * * and Betsey Johnston Brooke, his wife, all my estate, real as well as personal * * to have and to hold the same to said John Edmund Brooke and his wife, Betsey Johnston Brooke, and to the survivor of them to, for, with, and upon the uses, trusts, limitations, provisoes, powers, conditions, and limitations hereinafter provided and expressed of and concerning the same, that is to say: in the first place, to and for the support and maintenance of the said John Edmund Brooke and his wife * * during their joint lives and during the life of the survivor of them; secondly, for the support, education, and maintenance of the children of the said John Edmund Brooke and Betsey Johnston Brooke * * and after their death, then to all their children, share and share alike, as may survive them

Statement.

and the heirs of the bodies lawfully begotten of such as may not survive, forever: provided the said John Edmund Brooke and Betsey Johnson Brooke, or the survivor of them, shall not by any instrument or instruments under their hands and seals, or the hand and seal of such survivor, make any other distribution of the same between their said children and their said heirs except as they are hereinafter empowered to do * * * and I hereby empower the said John Edmund Brooke and his wife, Betsey Johnston Brooke, jointly during their joint lives, but not either of them, * * * any or all of the said lands and tenements, mortgages, and all other securities to sell, convey, and absolutely dispose of, and for that purpose any deed or deeds to execute, sign, seal, and deliver, and any mortgage or mortgages or other securities to accept and take, securing the purchase money or any part thereof, at such time or times as they * * * may think fit, and to stand possessed of the said proceeds of such sale or sales to and upon the same trusts, uses, and conditions as hereinbefore provided with respect to my bequest to them. * * And I hereby further empower my son John Edmund Brooke and his wife, Betsey Johnston Brooke, during their joint lives or the survivor of them, by instrument under their hands and seals irrevocable, to take effect after their death, or sooner if they shall think fit, to divide said real and personal estate or the proceeds thereof * * * between their said children and their said heirs, if any, in such manner and in such proportion as to them may seem fit, or to exclude any of them entirely from any benefit or any portion thereof, if they shall see fit so to do, or in the meantime by any such instrument to convey and make over to any of them by way of advancement any portion of the same, to become theirs absolutely from thenceforth forever: provided always that nothing herein contained shall be construed to allow the said John Edmund Brooke and his said wife or either of them to mortgage or create any lien on any part of the said bequest to them, or in any way incumber the same by debts, either already contracted

or to be contracted by them or either of them, in any way *Statement.* whatsoever.”*

It was shewn, and not denied by the defendant, that the terms of the agreement and lease were reasonable, and such as a prudent owner would make of similarly situated property in the interest of himself and family, and that the property would soon become unproductive unless new buildings were erected thereon, and that the testator had made a similar lease of property similarly situated.

Upon the evidence taken at Chatham the case was argued at Toronto before ROSE, J., on the 6th December, 1889.

Matthew Wilson, for the plaintiffs. It is contended by the defendant that the plaintiffs have not the power to make the agreement or lease; that the term is too long; and that the provision as to payment for buildings of great value is beyond the powers of the trustees. The plaintiffs are trustees vested with the legal estate; they are trustees for the maintenance of themselves and children and the preservation and care of the property out of the proceeds of the estate; it is therefore their duty to so use the estate as best to realize an income with which to carry out the trusts. The power to manage the estate during the lives of the trustees and to make leases is a necessary adjunct to the duty to obtain an income for the purpose of carrying out the trusts. The trustees are expressly given the greater power of making an absolute conveyance, as well as of altering or directing the course of the estate upon their death, and of excluding any child from participation in the estate; it therefore must have been intended that the trustees should have the lesser power to make such leases as would best secure the largest income consistent with the due management of the estate in such a manner as an owner would prudently use his own property; and that power should be held to be incident and necessary to the

* This is the same will that was in question in *Fisken v. Brooke*, 4 A. R. 98.

Argument. proper execution of the trusts. I submit, as a matter of law, that the plaintiffs can give all reasonable leases. To determine whether a lease is reasonable or not, the Court should consider the nature and location of the property and other surrounding circumstances, also the rent which can, as the property now is, be obtained, and the income which may be derived under the agreement and proposed lease, and the reasonableness or unreasonableness of the trustees in making the proposed lease in the interest of the present *cestuis que trustent*, as well as in that of the remaindermen. In this case the testator made similar leases of similar property, and the proposed lease is shewn to be alike advantageous to the present recipients of the income and to the future owners; it will best conduce to the proper support and maintenance of the beneficiaries mentioned in the will, and will also make the estate more valuable for those who may afterwards be entitled, than if part of the estate is now taken to erect buildings; a tenant would not enter into binding covenants and pay large rents unless he secured a long term; the agreement is therefore a reasonable one and such, no doubt, as the testator contemplated; and it is not inconsistent with any provision in the will. See *Sheehy v. Lord Muskerry*, 1 H. L. Cas. 576. A trustee who has the management of property may grant any reasonable lease unless expressly or impliedly restrained: Underhill's Law of Trusts and Trustees, 3rd ed. p. 308; Hill on Trustees, 482; *In re Cross*, 27 Beav. 592. Trustees having a general power of superintendence and management, and a duty to repair, will be allowed sums expended in erecting and repairing buildings: Lewin on Trusts, 8th ed., pp. 576 and 595; *Bowes v. Strathmore*, 8 Jur. 92. It must therefore be within the powers of the plaintiffs to make a reasonable lease providing for the erection of buildings; and under the circumstances this is a reasonable lease: Hill on Trustees, p. 428; *In re Leslie's Settlement Trusts*, 2 Ch. D. 185; *Greason v. Keteltas*, 17 N. Y. 491.

Morson, for the defendant. We have no Settled Estates Act such as exists in England. Before that Act in England,

trustees could not give a building lease without express Argument. power or the consent of the *cestui que trust*: Emden's Law of Building, 2nd ed., p.7, and cases there collected. At least the power was so doubtful that the lease would not be forced upon an unwilling lessee. The Court (independently of the statute) would not authorize trustees for infants to grant a mining lease although the lease would be for the benefit of the infants: *Wood v. Patteson*, 10 Beav. 541. The Court also refused to give authority to trustees to grant leases of real estate for a term not exceeding ten years: *In re Shaw's Trusts*, L. R. 12 Eq. 124. Express power is usually given to trustees where it is intended that they shall make leases binding on the remaindermen: *Sheehy v. Lord Muskerry*, 1 H. L. Cas. 576; *Mostyn v. Lancaster*, 23 Ch. D. 583. By this will power to sell is expressly given, and therefore a power to lease should not be implied: *Evans v. Jackson*, 8 Sim. 217. Express power must be given to trustees to enable them to make leases for long terms: *Hill v. Hill*, 6 Sim. 136; *Duke of Bedford v. Abercorn*, 1 My. & Cr. 312; and the tenants for life cannot without express power create (by the undertaking to pay for the building at the end of the term) a burden upon the inheritance which the remaindermen must pay off. To grant a decree for specific performance against the defendant would subject him to an action by the *cestuis que trustent* upon the death of the trustees.

Wilson, in reply. This is not a simple case of tenant for life and remainderman, where the former cannot for his own benefit incumber the latter's estate. Here the trustees have sole control during their lifetime of the interests both of the present beneficiaries and the future owners. The plaintiffs under their express powers can deprive any child or *cestui que trust* of all interest in remainder: it is therefore not unreasonable that the trustees should have the lesser power of charging a portion of the property with the payment for buildings, when without the buildings the property would be practically useless to produce an income for the support and maintenance of the

Argument.

children. The American more than the English cases are applicable to the circumstances of a new country, but even the English decisions are not contrary to the plaintiffs' contention. I refer particularly to *Greason v. Keteltas*, 17 N. Y. 491, already cited, where the general power of management given to trustees was held to authorize a lease by them for twenty-one years, with a covenant to renew or to pay for buildings to be erected by the lessee such sum as two sworn appraisers might then fix ; and to the language of Pratt, J., at p. 501 : " Indeed, it seems to me, if the trustees had allowed the property . . . to have remained vacant and unproductive, subject annually to the enormous taxes, . . . they might well have been chargeable with gross neglect of the duties which they had assumed in accepting the trust. They would have been more culpable than the unprofitable servant, who hid the talent entrusted to him in a napkin, for in that case no expense would be incurred in its preservation." In *Naylor v. Arnitt*, 1 Russ. & My. 501, it was held that a trustee to manage and apply the rents of an estate might make a lease for ten years, and that case was followed in *Fitzpatrick v. Waring*, 11 L. R. Ir. 35 in which it was said, at p. 53, (distinguishing *Wood v. Patteson* and *In re Shaw's Trusts*) that a trustee without express power might make a yearly or other reasonable letting of tenantable land. The Lord Chancellor in *Attorney-General v. Owen*, 10 Ves. at p. 560, shews that the power of a trustee (apart from his express authority) depends upon the reasonableness of the lease, and says that the ordinary husbandry lease is for twenty-one years, and building leases are sometimes made for sixty or ninety years, at a rent increasing from time to time. I therefore submit that the plaintiffs have ample power to make such a reasonable lease as that in question, and the plaintiffs are entitled to have the lease executed and a judgment for specific performance : *Robertson v. Patterson*, 10 O. R. 267 ; *Walsh v. Lonsdale*, 21 Ch. D. 9, per Jessel, M. R.

Judgment was given at the conclusion of the argument. Judgment.

Rose, J.

ROSE, J.:—

Held that power to manage the testator's property necessarily arose from the vesting of the legal estate in the trustees with directions to apply the proceeds or income therefrom as is in the will provided; that for the proper management of the estate it was necessary to make reasonable leases, and the authority to do so must be implied, particularly as such authority was not inconsistent with any provision in the will; that in ascertaining what was reasonable, a reference to the circumstances of each case was indispensable; that the terms of the agreement and lease in question were under the circumstances of this case, reasonable; that the trustees (the plaintiffs) had power to make such an agreement and lease, and in so doing to bind the trust estate; and that the defendant also was bound thereby, and should specifically perform the agreement.

The judgment of the Court as settled was as follows:

1. It is declared and adjudged that the plaintiffs as trustees have the right and power under the will in the pleadings set out to make, execute, and carry out the agreement in the pleadings mentioned and set forth, and the lease thereby agreed to be made; and that said agreement is valid and binding upon the parties hereto and the estate held and represented by the plaintiffs.

2. It is further declared and adjudged that the plaintiffs are entitled to specific performance by the defendant of the said agreement, and the defendant is hereby ordered and adjudged to specifically perform the same, and to execute and deliver to the plaintiffs forthwith the lease referred to in the statement of claim and tendered by the plaintiffs to the defendant.

3. And it is further ordered and adjudged that the defendant do pay to the plaintiffs their costs of and incidental to this action forthwith after the taxation thereof.

COMMON PLEAS DIVISION.

MASON V. THE SOUTH NORFOLK RAILWAY COMPANY.

Damages—Agreement for sale of land—Obstruction to land by railway company—Rights of vendor and purchaser as to damages.

The plaintiff was in possession of certain lands under an oral agreement of purchase at \$450, payable in bricks deliverable as demanded, of which \$100 worth had been demanded and delivered. The defendants, without making any compensation or taking any steps under the statute therefor, built their railway in front of the land so as to interfere with the plaintiff's right of access, whereupon this action was brought, and damages recovered by the plaintiff he being treated as entitled to the whole estate in the land and the injury permanent, reducing the value of the land.

Held that the company were trespassers, and could not justify the acts complained of under the statute: that substantial damages, on proof of them, were recoverable for the disturbance of the possession; but in a first action only nominal damages for the injury to the reversion.

Held therefore that the damages here were not properly assessed, and a new trial was directed.

Semble that the damages for injury to the reversion belonged to the vendor; and leave was given to add him as a party plaintiff.

The position of a vendee under a contract for sale of land considered.

Statement.

THIS was an action tried before STREET, J., and a jury, at Simcoe, at the Fall Assizes of 1889.

The action was for consequential damages occasioned by the defendant company building its road in front of the premises occupied by the plaintiff, and interfering with the way of access thereto.

The jury assessed the damages at \$175, evidently treating the plaintiff as entitled to the whole estate in the land, and the injury as permanent, reducing the value of the land.

A motion was made to the Divisional Court to set aside the judgment entered for the plaintiff, and to enter judgment for the defendants.

In Michaelmas Sittings, 1889, *E. D. Armour*, supported the motion.

Robb, contra.

The authorities cited sufficiently appear from the judgment.

December 21, 1889. ROSE, J. :—

Judgment.

Rose, J.

The plaintiff was in possession under an oral contract of purchase from one Dr. Hayes. The consideration was \$450 to be paid in bricks, which were to be delivered as demanded by the vendor. Bricks to the value of \$100, as I understand the evidence, had been demanded and delivered, and so we must treat the plaintiff as in possession, and not in default.

The sole point raised by the defendants' counsel is, whether the plaintiff not having the legal estate could recover.

It has been held that a person having an equitable title can recover possession of land: *Thorne v. Williams*, 13 O. R. 577, 579; *Heenan v. Heenan*, 3 C. L. T. 163.

But here something more is sought, not only possession, but the amount representing the diminution in value by reason of the obstruction.

I think the effect of *West v. Corporation of Parkdale*, 12 App. Cas. 602, at p. 614, is, that the company must be treated as trespassers; not having made compensation prior to doing the work, it cannot justify the acts complained of by pleading the statutory authority of the railway companies.

If so, then can the amount sought to be recovered, or the mode of recovering it be governed at all by the Railway Act? Probably not. If it could then, under sec. 92 of the Railway Act of 1888, the company was required to make "full compensation" * * to *all parties* interested," and both the plaintiff and his vendor would be interested, for until the purchase money has been paid, the vendor has really a greater interest in the land than the plaintiff.

While, if the company is precluded from setting up the provisions of the Act, it is difficult to see how sec. 92 applies: the language of Lord Macnaghten, at p. 616, suggests if it does not declare that even after the work has been commenced the company may take the steps necessary to have compensation assessed, for he speaks of the protection which must be afforded if the company "were

Judgment. willing to put the matter in train for the assessment of
Rose, J. *compensation.*"

Then what is the exact status of the plaintiff? I am indebted to my learned brother STREET for reference to the cases of *Trotter v. Watson*, L. R. 4 C. P. 434, 450, and *Lysaght v. Edwards*, 2 Ch. D. 499, where are most interesting and instructive discussions as to the interest of a vendee of land under a contract of purchase.

In both cases *Wall v. Bright*, 1 Jac. & W. 494, is treated as good law. There we find such expressions as follow: It is "in equity no longer his": "he (the vendor) "is considered constructively to be a trustee of the estate for the purchaser, and the latter as a trustee of the purchase money for him." "Before it is known whether the agreement will be performed, he" (the vendor) "is not even in the situation of a constructive trustee; he is only a trustee *sub modo*, and provided nothing happens to prevent it. It may turn out that the title is not good, or the purchaser may be unable to pay; he may become bankrupt, then the contract is not performed, and the vendor again becomes the absolute owner; here he differs from a naked trustee, who can never be beneficially entitled. We must not therefore pursue the analogy between them too far. The agreement is not for all purposes considered to be completed. Thus, the purchaser is not entitled to possession, unless stipulated for; and if he should take possession, it would be a waiver of any of the objections to the title; the vendor has a right to retain the estate in the meantime, liable to account if the purchase is completed, but not otherwise. Till then, it is uncertain whether he may not again become the sole owner; *the ownership of the purchaser is inchoate and imperfect; it is in the way to pass, but it has not yet passed.*"

Bovill, C. J., adds, at p. 450 of L. R. 4 C. P.: "And though the general doctrine of courts of equity may be as stated by the learned counsel, it falls far short of shewing that the purchaser has an equitable estate, as distinguished from an equitable interest."

In *Lysaght v. Edwards*, Jessel, M. R., at p. 504, comments on *Wall v. Bright*, premising by saying that he thought it was impossible for him to say it was not law. It would be necessary to extract very fully to fairly give the effect of what the learned Judge then said, at p. 508, but I will quote the following citation by the Master of the Rolls, from Lord Cairns's judgment in *Shaw v. Foster*, L. R. 5 H. L. 321, at p. 338. "Under these circumstances I apprehend there cannot be the slightest doubt of the relation subsisting in the eye of a Court of Equity between the vendor and the purchaser. The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner in the eye of a Court of Equity of the property subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee *having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that interest if anything should be done in derogation of it.* The relation, therefore, of trustee and *cestui que trust* subsisted, but subsisted *subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property.*" The Master of the Rolls adding: "That interest being, as I said before, a charge or lien upon the property for the amount of the purchase money."

The vendor in this case has therefore in him the legal estate and a substantial interest in the property, and an *active right* to assert that interest, if anything should be done in derogation of it; and, it seems to me, that any act which would lessen the value of the property would be in derogation of the vendor's right by lessening the value of his security, *i.e.*, of property on which he has his lien.

The vendee, the plaintiff, is not entitled to a conveyance, may never become entitled; may become bankrupt and unable to complete the purchase.

In *Vallance v. Savage*, 7 Bing. 595, Tindal, C.J., said, at p. 599: "It has been objected that Sarah Pell was not tenant to the plaintiff, but to James Vallance; and, consequently,

Judgment.

Rose, J.

Judgment.

Rose, J.

that the plaintiff had not the reversionary interest set forth in the declaration. The evidence was, that John Vallance the plaintiff was a trustee; that James Vallance was his *cestui que trust*, and had let the premises in question to Sarah Pell, from whom he received the rent. It was therefore the simple case of trustee and *cestui que trust*. *The legal interest is in the trustee; actions must be brought by him; the cestui que trust has no interest in law; if he enters, his possession is considered the possession of the trustee; and any disposition made by him and adopted by the trustee is considered the disposition of the trustee, the cestui que trust only possessing the property in the right of the trustee.*

* * Even in the case of mortgagor and mortgagee, whose interests are adverse, acts of the mortgagor assented to by the mortgagee are considered as acts of the mortgagee. By the stronger reason, therefore, the act of the *cestui que trust*, whose interest is under the trustee, must, if known and not repudiated, be considered the act of the trustee."

Is not the position of vendor and vendee somewhat similar until the purchase money has been paid, and all acts done by the vendee to entitle him to a conveyance of the land at which time the vendor becomes a bare trustee?

If the vendee enter into possession under his contract with the vendor, is he not a tenant whose possession can be determined at the will of his vendor so soon as the purchase money becomes in arrear, or any other act is done disentitling him to retain possession? Is not his possession the possession of the vendor, the holder of the legal estate, and must he not defend his possession under the title of his vendor?

So far as his possession is concerned, if a trespasser interferes with it he may obtain such damages as he sustains by reason of interference with his right of possession, but if the property is injured by permanent acts, so that its value would be lessened, as, for instance, by cutting down timber, carrying away soil, building walls across ways of access, cutting watercourses, or flooding by turning the

courses of streams, would not the vendor, in whom is the legal estate, be in a position to assert his "paramount right of the vendor and trustee to protect his own interest?"

Judgment.

Rose, "J.

I am not overlooking *Baker v. Mills*, 11 O. R. 253, where it was held that an heir-at-law or devisee cannot maintain trespass before entry, nor *Western Bank of Canada v. Greey*, 12 O. R. pp. 76-7, where it was held that "a mortgagee not in possession, or a landlord after the end of a lease, or heir or lessee or assignee of lessee cannot maintain trespass before entry."

But I think I am not here bound to determine whether a vendee upon the facts of this case can maintain an action for permanent injury to the freehold, for it seems to me that, as I have indicated upon the authority of *West v. Corporation of Parkdale*, 12 App. Cas. 602, the defendant company being a trespasser, and unable to plead the statute, it must be treated as any other trespasser. The trespass was a continuing one, and fresh damage accrues from day to day, and a new right of action arises each day: *Holmes v. Wilson*, 10 A. & E. 503; *Bowyer v. Cook*, 4 C. B. 236.

For such a trespass the occupant or person in possession has a right of action, the damages being confined to the disturbance of such possession.

The obstruction in this case is of a permanent character, and injurious to the reversion.

The law is collected in Addison on Torts, 6th ed., pp. 56, 364, 390; Roscoe's N. P., 15th ed., p. 679; Bullen & Leake, 3rd ed., pp. 348, 378, 394, 395, 416, 425, 429; Mayne on Damages, 2nd ed., pp. 63, 334; Woodfall's, L. & T., 12th ed., pp. 655, 657, 660, 671, 680, 704, 706, 707, where, amongst other cases, are cited *Battishill v. Reed*, 18 C. B. 696; *Kidgill v. Moor*, 9 C. B. 364, 378; *Dobson v. Blackmore*, 9 Q. B. 991, 1004; *Hopwood v. Schofield*, 2 Moo. & Rob. 34; *Bell v. Midland R. W. Co.*, 10 C. B. N. S. 287; *Wilkes v. Hungerford Market Co.*, 2 Bing. N. C. 281.

But to the reversioner the damages should be only nominal in the first action: *Hopwood v. Schofield*, 2 Moo. & Rob. 34; *Battishill v. Reed*, 18 C. B. 696.

Judgment.

Rose, J.

The defendant by paying the damages in the first suit is not protected against further actions, otherwise he would be purchasing a right to commit a wrong. *Id.*

At common law as a continuing trespass is a fresh ground of action every day, the jury could not lawfully give damages in respect of injury subsequent to the day of the commencement of the action; but damages in respect of any continuing cause of action are now assessed down to the time of assessment: Con. Rule 680. See Pollock on Torts, Bl. Ed. 344.

Damages for an *anticipated continuance* of the nuisance, cannot be recovered; but if the defendant persists in continuing the nuisance after a verdict against him for nominal damages, the jury in a second action may give vindictive damages to compel him to abate the nuisance: *Battishill v. Reed*, 18 C. B. 696; *Shadwell v. Hutchinson*, 4 C. & P. 333.

For the same reason, *i.e.*, that a continuing trespass is a fresh ground of action every day, if part of the time during which the trespass was continued is beyond the *period of limitation*, damages can only be recovered for the trespasses within such period: *Wilkes v. Hungerford Market Co.*, 2 Bing. N. C. 281.

I am indebted to my learned brother Osler, for a reference to *Wilkes v. Gzowski*, 13 U. C. R. 308, where many of the above principles are applied. It has so direct a bearing that I give the headnote.

"The Grand Trunk Railway Company gave a notice to the plaintiff under 14 & 15 Vic. ch. 51, sec. 11, sub-sec. 5, of their intention to take about 11 acres of his farm, through which their line passed. They afterwards withdrew this notice, and informed the plaintiff verbally that a new notice would be given, but omitted to give it. The quantity marked on the company's map, which was duly filed, was only 2.25 acres. The defendants', contractors under the company, having entered upon this portion, and constructed it: *Held*, that the plaintiff was entitled to recover damages for the loss of occupation of such portion,

and for the inconvenience occasioned to him in the use of his farm by its being thus intersected, up to the commencement of this action.”

Judgment.

Rose, J.

If the defendant company desire to avoid the bringing of fresh actions, it may act on the suggestion of Lord Macnaghten in *West v. Corporation of Parkdale*, and “put the matter in train for the assessment of compensation.”

It thus appears that the plaintiff has a cause of action, but that the damages have been assessed on a wrong principle.

For the disturbance of his possession he may recover substantial damages if he can prove them, and as even if he is entitled to recover in respect to the whole estate the damages for injury to what may be called the reversion, *i.e.*, the estate remaining after carving out the tenancy under which he occupies the land, such damages should be merely nominal. We need not, I think, formally determine whether or not he has such right. At present I incline to the opinion that the vendor has the right to recover for the injury sustained by the lessening of his interest; but I am not clear about it, and so say nothing further.

As the case must go down again for a new assessment of damages, I think the plaintiff may add his vendor as a party plaintiff, especially as he should only have assessed to him at present nominal damages.

I have been favored with the manuscript judgment of the Court of Appeal in *West v. Corporation of Parkdale*, on an appeal from the Chancery Division, as to the mode of determining the damages to which the claimants there were entitled. I think that while here the road-bed is a permanent obstruction entitling the reversioner to bring an action for injury which he might sustain, it is not permanent in the sense that it may not be removed by physical labor.

I understand that the case is to be reported. The principles I have above referred to, as well as the measure of compensation, are there discussed.

The result is, that in my opinion we cannot give effect to the motion to dismiss the action, as the plaintiff is en-

Judgment. titled to maintain it ; but as the damages have been assessed
Rose, J. on a wrong principle, there must be a new trial.

The defendant's motion not prevailing, it should have no costs, and the plaintiff having a verdict which cannot stand, is not entitled to costs. There should, therefore, be no costs to either party of the trial or motion before the Divisional Court.

GALT, C. J., and MACMAHON, J., concurred.

[COMMON PLEAS DIVISION.]

FREEMAN V. FREEMAN.

Will—Validity of—Instructions for—Mental and physical capacity of testator—Donatio mortis causa—Sufficiency of.

The testator when nearly eighty years of age executed a will devising the whole of his estate to a son and daughter by his first marriage to the exclusion of his wife and other children of the second marriage. At the time of its execution he was on his death-bed, staying with his daughter in the United States, having shortly before left his farm in Ontario without any notice to his wife and other children. For some time before he had been afflicted with a complication of diseases rendering him incapable of managing his farm, and which resulted in his death shortly after the execution of the will in question. A will was prepared by an attorney practising in the place the testator was staying, leaving everything to the daughter, solely on the instructions of her husband. On this being read over to the testator, who was lying in bed and unable to rise, suffering great physical and mental prostration, he remarked that it was not right, that he wanted the son's name in it too. The will in question was then prepared, and after being read over to him, without explanation as to the effect of the language used, was executed by him, with assistance, with great difficulty. The attorney and medical man in attendance were of opinion that he had sufficient mental capacity to make a will. The same attorney had sometime before induced him to refrain from making a similar will. Shortly before the execution of the will he had handed to his daughter a bank deposit receipt which she had transferred to her name, and partly used, he stating that he wanted her to take care of him, and that he was going to have a will drawn. From the evidence it appeared that the testator, as well as his daughter, were under the impression that the will had reference to the deposit receipt only:—

Held, (varying the judgment of the trial Judge) that the will was invalid, its execution under the circumstances of the testator's condition, and the absence of any explanation to him of the effect of his testamentary act, being a fraud on the part of those concerned in procuring its execution:—

Held, also, that the gift of the deposit receipt was a valid *donatio mortis causa*.

THIS was an action tried before FALCONBRIDGE, J., *Statement*, without a jury, at Chatham and finished at St. Thomas, at the Autumn Assizes of 1888.

The action was instituted by the widow and a number of children of the late Bryant Freeman, of the township of Raleigh, in the county of Kent, farmer, against the defendants, who were two of the children of the said Bryant Freeman by his first wife, to have the will of the said Bryant Freeman in favour of the defendant, declared invalid and void, upon the following grounds:

Statement.

1. Because, if executed by said Bryant Freeman, that the witnesses did not subscribe their names in the manner and form required by the Wills Act of Ontario.

2. That the said alleged will was obtained by undue influence, and while the said Bryant Freeman was incapable of making a will.

The will in dispute was as follows :

“Ann Arbor, Michigan, December 14, 1886.

“Know all men by these presents, that I, Bryant Freeman, of Ann Arbor, State of Michigan, being in ill health, but of sound and disposing mind and memory, do make and publish this my last will and testament, hereby revoking all former wills by me at any time heretofore made.

“First. I hereby constitute and appoint my daughter, Harriet Wright, to be my sole executor of this my last will, directing my said executor to pay all my just debts and funeral expenses.

“Second. After the payment of my said debts and funeral expenses, I give and bequeath to my daughter, Harriet Wright, and my son, Noah Freeman, equally, share and share alike, all my property of every name and kind, both real and personal.

“In testimony whereof I hereby and hereto set my hand and seal, and publish and declare this to be my last will and testament in presence of the witnesses named below, on this 14th day of December, 1886.

(Signed,) “BRYANT J. FREEMAN (L. S.)

“Signed, sealed, published, and declared by the said Bryant Freeman as and for his last will and testament in presence of us, who, in his presence and in the presence of each other, and at his request, have subscribed our names as witnesses hereto.

(Signed,) “ALEX. W. HAMILTON,
“JEROME JOHNSON.”

The learned trial Judge, after taking time to consider, on the 21st of February, 1889, delivered the following judgment :

FALCONBRIDGE, J. :—

This was an action by the widow and younger surviving children of Bryant J. Freeman, late of the township of Raleigh, against the two adult children of Bryant Freeman (by a former marriage), to set aside an alleged will of Bryant Freeman, and an alleged gift to defendant, Hannah Wright, of a bank receipt of \$500.

The trial of the case occupied two days in Chatham and one at St. Thomas. I had, at the close of the argument, formed a strong opinion in favour of the plaintiffs, which

opinion has been confirmed by a reference to the cases cited, and to other authorities in point.

There being no official stenographer attached to the Queen's Bench Division, or otherwise at my disposal, for the purpose of giving judgments, I find myself obliged, having regard to numerous other claims upon my time, to forego any analysis of the evidence, and to content myself with stating my conclusions.

The facts appearing in evidence will amply justify my findings; but I may state, for the information of any Court which may be called on to review this judgment, that I find the witness, Jerome Johnson, not to be a credible witness, but on the contrary utterly unworthy of belief.

The value of the evidence of the other witnesses who attempted to prove the due execution of a will, can be tested by the light of surrounding circumstances and the other common and ordinary standards of veracity; and as to their demeanour I offer no observation.

I find that the paper propounded by the defendants ought not to be allowed to stand as the will of Bryant Freeman.

"I cannot come to the conclusion that the deceased had the power of summoning, and did successfully summon, his faculties to the consideration of the nature of his property, the various persons who were the fit objects of his regard, and their respective claims upon his bounty:" *Wilson v. Wilson*, 22 Gr. 87.

The execution of the said paper was obtained by undue influence.

And I declare that the said Bryant Freeman died intestate; and I order the defendants to account for the \$500 which the defendants have appropriated to their own use. After payment of the sum of \$500, the plaintiffs, (other than the widow) and the defendants, are each entitled to an undivided interest in the lands and goods of the said Bryant Freeman, subject to the interest of the widow as doweress and to a mortgage.

The costs of this action to be paid out of interests or shares of the defendants in the said lands and goods, or otherwise by the defendants.

There will be reference to the Master at Chatham.

The defendants gave notice of appeal, and amongst other grounds, set up that, as to the sum of \$500 in the pleadings mentioned, the defendant, Harriet Wright, is lawfully

Judgment.
Falconbridge,
J.

Argument. entitled to retain the same under the circumstances disclosed in the evidence, and cannot be called upon to account in this action for the disposition of any part thereof.

The cause having been transferred to this Division, during Easter Sittings, 1889, *Moss*, Q. C., and *White* supported the motion when

Wilson, (of Chatham) shewed cause.

The arguments and cases cited sufficiently appear from the judgment.

September 7, 1889. MACMAHON, J. :—

The facts are somewhat peculiar. Bryant Freeman became the grantee from the Crown, in 1865, of eighty-five acres of land, in the township of Raleigh, in the county of Kent, which, at the time of his death, on the 27th of January, 1887, was valued at from \$3,000 to \$3,500, and was free from incumbrance up to the 27th day of September, 1886, on which day he went to the town of Chatham, and raised the sum of \$705 on a mortgage thereon from James Dillon, repayable in three years, with interest thereon at the rate of 24 per cent. per annum, and having received the money left Canada for the United States, without informing his wife or the children, then living with him, of his intention. They were left in possession of the farm.

At the time of his death, Bryant Freeman was supposed to be about 78 years old, and for two or three years prior to his decease complained of excessive pains in his head, resulting, as he thought, from the effects of a sun-stroke received in the Southern States nearly forty years before. He was also afflicted with a tumor in his throat, causing great distress; and, as a consequence of these complicated troubles, he had been unable to take any interest in or manage his farm, and had been advised by his attendant physician to consult Dr. Maclean, of Ann Arbor, with

the view to an operation for the removal of the tumor from his throat. He reached Ann Arbor about the 1st day of October, 1886, and went to the house of his daughter, the defendant, Harriet Wright, who had left her home in Raleigh some eight years before, and had been married to Henry Wright three or four years prior to his death, which occurred shortly before this action was commenced.

Judgment.
MacMahon,
J.

After reaching his daughter's house, Bryant Freeman consulted a Dr. Darling, who visited him for four or five weeks; and from the 9th of November until the 22nd of December Dr. Tyler was his attendant physician, and visited him on the 14th of December, and was in Wright's house on that day when Mr. Hamilton, an attorney, called to draw Freeman's will.

In October, 1886, the defendant, Noah Freeman, who resided in Indianapolis, in the State of Indiana (who left his father's home about fourteen years before this), came to Ann Arbor, and Noah went with his father to Mr. Hamilton's office for the purpose of having the latter's will drawn.

What took place at the interview between the parties, is thus stated by Hamilton in his evidence :

“Q. How long have you been practising law? A. Since 1872.

Q. Do you remember Bryant Freeman? A. Yes, sir.

Q. When did you first see him? A. I think I saw him first in October, 1886.

Q. Where was he? A. He came to my office.

Q. For what purpose? A. He came with Noah Freeman. He asked me to draw his will at that time.

Q. Was there any discussion between you and him about the will at that time? A. Yes, sir.

Q. What did he say with regard to it? A. He stated the provisions of the will, and I advised him not to draw it at that time.

Q. What were the provisions; were they taken down in writing? A. No; simply an oral conversation. The provisions, as he stated them, that he desired to give his property to Noah and to Mrs. Wright. I learned from him that he had other children and a wife living, and I advised him not to draw his will in that way at that time. He then stated to me that he had trouble at home with his family. We had some conversation in reference to that, and he left the office.

Judgment. Q. Then you asked him to consider whether he would make the will in that way or not?
MacMahon, J. HIS LORDSHIP.—Mr. Hamilton says he advised him not to have it done that way.”

Bryant Freeman and his son Noah went to the office of Mr. Hamilton again on the 8th of November, when Bryant Freeman executed a deed of thirty-five acres of the farm in favor of Noah, the consideration mentioned in the deed being \$705. The conveyance was expressed to be subject to a mortgage for \$705, which the party of the second part (Noah) agreed to assume and pay off.

It may be that the design was to sell the thirty-five acres mentioned in the deed, and pay off Dillon's mortgage with the money realized from the sale. It is at all events, I think, apparent from the evidence that, although the conveyance to Noah was in form absolute, it was not intended for his benefit, and that he was merely acting as agent for the father in endeavouring to sell the thirty-five acres. No money passed from Noah to his father at the time the deed was executed.

Noah came to Raleigh, and tried to induce his step-mother, who was mentioned in the conveyance as one of the grantors, to execute the same, but, as she refused to do so, no sale was effected.

Hamilton is a witness to the deed.

After Freeman reached Ann Arbor he deposited \$500 of the money received from Dillon in a bank there, obtaining a deposit receipt therefor, and this he had in a trunk in Mrs. Wright's house, from which he requested her, on the 13th of December, to fetch it to him, and, according to her evidence, after he had extracted the receipt from a roll of papers, he delivered it to her, stating he wanted her to take care of him, and told her he was going to have his will made.

Mr. Hamilton was asked if, at the time the conveyance of thirty-five acres to Noah was executed, Bryant Freeman mentioned anything about the will he desired to have drawn when he was at Hamilton's office in October, to

which Hamilton replied, that he did not think the matter was discussed at that time. Judgment.

He then gives the following account of his being sent for to go to Wright's house to draw Freeman's will, and of what took place after seeing Freeman :

MacMahon.
J.

“Q. When did you next see him with regard to his will? A. I saw him in December; Mr. Wright, Mrs. Wright's husband, came for me to the office and asked me to go to his place,—to Mr. Wright's, in the city of Ann Arbor—and draw Mr. Freeman's will; he stated at that time that he was very ill.

Q. In consequence of that did you go to Mr. Wright's house? A. Yes; and he also stated to me at that time, as I understood him, he wanted the will drawn in favour of Mrs. Wright.

Q. Who stated that? A. Mr. Wright, from his conversation at that time.

Q. Did you go to the house? A. I did, sir.

Q. Did you find Mr. Freeman there? A. I did.

Q. Did you have any conversation with him? A. I stepped to the door after going in, and I said, ‘Mr. Freeman, you want I should draw your will, do you?’ and he nodded his head that way. I sat down in another room, and prepared a will as Mr. Wright had stated to me, took it into the room, my man who works for me had driven me down, and going into the office—Dr. Tyler was there at the time I first came, but left while I was preparing the will—I then asked Mr. Johnston to step into the room with me, and asked Mr. Freeman if he was ready to hear the will, and he said he was. (Mr. Johnson is my man). I read the will over to him, and he said that is not right, I want Noah's name in the will, too. I said, then, ‘do you want anybody else's name in?’ and he says, ‘Noah's and Harriet's;’ I think he called her Harriet. I said, ‘to them and to them only?’ and he said, ‘yes.’ I went back and prepared another will in the adjoining room, and then took it into him, called Mr. Johnston into the room again, and read that will over to him, and asked him if that was as he wanted it? He says, yes. He was lying in bed at that time. I said, you will have to get up to sign this will, you cannot sign it lying down, and I called Mr. Wright into the room to raise him up. I stood by him, and as Mr. Wright came in he stepped back of him and raised him partly up. I assisted him partially to a sitting posture, and then I placed the will before him. He took the pen and commenced to write, and I saw that he was writing with very great difficulty, and I said to him, do you want that I should assist you? and he said, yes, or I understood him to say yes, he bowed his head in that way, and I took the top of the pen, at the same time steadying his hand, and the signature was written in that way.

Q. Who were the witnesses? A. I was one of the subscribing witnesses and my man, Mr. Johnston, was the other.

Q. Is that the document that you prepared, and that he so executed? A. Yes, sir.

Judgment.

Q. The signature is the signature of Freeman made as you describe?

A. Yes, sir.

MacMahon,
J.

Q. And these are the signatures of yourself and Mr. Johnston? A. Yes, sir; this is my signature and this is Mr. Johnston's.

On that day Mr. Hamilton considered Freeman had mental capacity sufficient to dispose of his property by will; and Dr. Tyler who saw him that morning, said that his mind was clear; that he answered promptly, and conversed freely; and that he considered him qualified to do anything required with his property.

But on that same day, and after the execution of the will, Mrs. Wright wrote to her sister Josephine at Raleigh, and without mentioning anything about the will, asked her to write, "and let father hear from you all before he dies; I don't think you will ever see him again. We are looking for him to die every hour, the doctor says he cannot live, so please write."

The reason assigned by her for writing in this strain was, she says, to induce the family to write.

James Stewart, who was in attendance on Bryant Freeman during the latter part of December, 1886, and the early portion of January, 1887, said that Freeman had "fainting spells" lasting from an hour to an hour and a half, showing that he was extremely weak physically.

From the account furnished by Hamilton, it is clear that Freeman gave no instructions as to how his will was to be drawn, and the subjects of the intended testamentary disposition were not even referred to. In fact, when Hamilton immediately on entering Wright's house, said: "Mr. Freeman you want I should draw your will, do you?" Freeman did not make a verbal reply, but merely nodded his head, and on the strength of this Hamilton prepared a will, as he states just as Wright had directed him, by which the whole of Freeman's property real and personal was left to Wright's wife.

That will, so far as the subjects of the intended testamentary disposition, and the object of the testator's bounty, as expressed therein are concerned, was a will drawn upon

the instructions or supposed instructions of Wright, and not upon any communication made by Freeman to Hamilton as to his wishes or desires in the matter. So that unless the statement made by Freeman upon hearing that will read, that it was not right, and that he wanted his son Noah's name included as a beneficiary, can be considered as furnishing instructions for the preparation of a will, whereby all his estate real and personal was to be devised to Mrs. Wright and his son Noah, to the exclusion of the rest of his children, then no instructions were given, because not a syllable beyond what I have stated was, according to the evidence, uttered by the testator, to indicate what portion of his estate he intended to dispose of by his will.

Judgment.
MacMahon,
J.

When the deposit receipt was at Freeman's request taken from the trunk, it was then he spoke of having a will drawn, and Mrs. Wright supposed that it was in relation to the deposit receipt he desired a will drawn, and she stated in her evidence at the trial, and also to several of her relatives after her father's death, that neither herself nor her husband supposed that the real estate in Canada was included in the will. Nor were they aware that it was so included, until after Freeman's death, when they were informed, that such was the case, by Hamilton.

This is the more singular because Mrs. Wright was present at the reading of the will, and appears from her evidence to be a woman of fair intelligence, and with a far greater capacity for understanding what was contained in a document in which she had an interest, than an aged man like her father, who, according to Hamilton's statement, he believed to be in his last sickness.

Mrs. Wright, at the request of her father, wrote to James Stewart, at Ypsilanti, to come and stay with him, and on coming to Ann Arbor remained in attendance upon Freeman for twelve and one-half days, for which he was paid \$18.50. He states that Freeman told him that Wright had induced him to make a will as to the money in the Ann Arbor bank, *i. e.*, the \$500 deposit receipt, but

Judgment. that he had not made a will as to the farm. He also
MacMahon, stated that Mrs. Wright told him that her father had made
J. no will as to the farm, but only as to the money in the
bank.

It is not in evidence whether Freeman made the statement to Stewart as to the contents of his will in presence of Mrs. Wright; but from the statement made to Stewart it is beyond question that he was aware that he had executed a will, but that he did not by such will intend to deal with or dispose of any portion of his estate beyond the \$500 he then had in Ann Arbor. This is also Mrs. Wright's statement as to her own and her husbands' belief at and after the execution of the will.

The deposit receipt was in Mrs. Wright's possession, and we must assume it was given to her by her father, as she states that he told her to keep it, and after payment of his debts and funeral expenses the balance was to be divided between herself and Noah, and that the receipt was changed to her name in the bank, and the amount deposited to her credit, upon which fund she drew for payment of the household expenses, and I suppose the physician's bills for attendance on her father; the payment of Stewart's account, &c.

In order to have the deposit transferred from Bryant Freeman to Mrs. Wright, it would be necessary for Freeman to endorse the receipt to her. Even without endorsement, the delivery of the receipt to her for her own use, would constitute at least a good *donatio mortis causa* in favor of Harriet Wright: *Veal v. Veal*, 27 Beav. 303; *Austen v. Mead*, 15 Ch. D. 657; *Clement v. Cheeseman*, 27 Ch. D. 631.

From the judgment of my learned brother FALCONBRIDGE, I assume that this point was not urged before him.

Mr. Moss urged that as the testator was shewn by the evidence to be possessed of testamentary capacity, and the will being read over to him at the time of its execution, that he knew what was contained therein; and in the

language of Sir J. P. Wilde, in *Guardhouse v. Blackburn*, 1 P. & D. 109, at p. 116, that "should * * be held conclusive evidence that he approved as well as knew of the contents thereof." *Atter v. Atkinson*, L. R. 1 P. & D. 665; *Goodacre v. Smith*, *ib.*, 359; *Thompson v. Torrance*, 28 Gr. 253, S. C., 9 A. R. 1, were also referred to by counsel.

Judgment.
MacMahon,
J.

The rules laid down by Lord Penzance, in his charge to the jury in *Atter v. Atkinson*, and the rules laid down by Sir J. P. Wilde, in *Guardhouse v. Blackburn*, must now be read subject to the modifications expressed by the House of Lords, in *Fulton v. Andrew*, L. R. 7 H. L. 448.

In *Fulton v. Andrew*, the testator, Hugh Harrison, after giving numerous specific legacies and individual bequests, and devising his freehold estates, made the following residuary devise: "All the residue of my real and personal estate, I devise and bequeath equally to the said Charles Batty Andrew and Thomas Wilson, whom I appoint to be executors of this my last and only will."

The will was contested, and it was ordered by the Court of Probate that the case should be tried at the Assizes, and was so tried on six issues. The first four required a determination of the fact whether the testator was of sound mind and understanding capable of making a will: the fifth, whether he knew of the contents of the will; and the sixth, whether he knew and approved of the residuary clause. The jury found for the propounders of the will on the first five issues, and for the opponents on the sixth. Notwithstanding the finding of the jury as to the sixth issue, the Judge of Probate made a rule absolute to enter the verdict for the propounders of the will, and granted probate, of the whole will, including the residuary clause. It was from the decision of the learned Probate Judge granting probate, so as to include the residuary clause of the will, that the appeal was taken to the House of Lords.

In that case the instructions for the will were given on the 9th of June, 1870; and it was alleged by Andrew and Wilson, the residuary devisees, that the will was read over to and left with the testator until the morning of the

Judgment. 11th of June, on which day it was executed. The testator
MacMahon, died in July, 1870.
J.

Lord Chancellor Cairns, in his judgment, at p. 460, after referring to the strong argument urged at Bar, that there was a species of non-direction, which amounted to misdirection, on the part of Mr. Justice Mellor, before whom the issues were tried at the Assizes, because "that learned Judge had not laid down before the jury that absolute and fixed rule of law with regard to the judging of the validity of a will" which, it was contended, he should have done on the authority of *Guardhouse v. Blackburn*, L. R. 1 P. & D. 665; and *Atter v. Atkinson*, L. R. 1 P. & D. 109; the Lord Chancellor proceeds: "Now my Lords, the rule of law which is said not to have been sufficiently considered is this: It is said that it has been established by certain cases to which I will presently refer, that in judging of the validity of a will, or of part of a will, if you find the testator was of sound mind, memory, and understanding, and if you find, farther, that the will was read over to him, or read over by him, there is an end of the case; that you must at once assume that he was aware of the contents of the will, and that there is a positive and unyielding rule of law that no evidence against that presumption can be received. My Lords, I should in this case, as indeed in all other cases, greatly deprecate the introduction or creation of fixed and unyielding rules of law which are not imposed by Act of Parliament. I think it would be greatly to be deprecated that any positive rule as to dealing with a question of fact should be laid down, and laid down now for the first time, unless the Legislature has, in the shape of an Act of Parliament, distinctly imposed that rule."

After referring to the cases of *Barry v. Butlin*, 1 Moo. P. C. 480, and *Baker v. Batt*, 2 Moo. P. C. 317, Lord Cairns proceeds to consider the charge of Lord Penzance to the jury in *Atter v. Atkinson*, L. R. 1 P. & D., at p. 670, and says: "I do not know that there is anything in that direction, taken as a whole, to which I could venture to make

any objection; but you will observe the very important qualification—I say, ‘taken as a whole.’ In the first place the jury must be satisfied that the will was read over, and in the second place must also be satisfied that there was no fraud in the case. * * It appears that these witnesses stated either that the will was read over to the testator, or that it had been left with him over night for the purpose of being read over. The jury may, or may not, have believed that statement, or may have thought, even if there had been some reading of the will, that that reading had not taken place in such a way as to convey to the mind of the testator a due appreciation of the contents and effects of the residuary clause.”

Judgment.
MacMahon,
J.

The House of Lords reversed the order of the Court of Probate, giving out probate of the whole will, and gave a direction to that Court as to issuing qualified probate of the will.

Fulton v. Andrew, was not referred to in *Thompson v. Torrance*, 9 A. R. 1, in which latter case, the testator, Rev. Dr. Barrie, a man of education and a minister of the Presbyterian Church, having become weakened by illness, executed a will a day or two before his death, the instructions for which were entirely obtained by the person preparing it by putting questions to the testator. The will when drawn was read over to the testator clause by clause, who expressed his assent to some of the bequests, while as to the others, he made intelligent remarks, and some changes in the provisions thereof. A suit was brought impeaching the will, on the ground of fraudulent practices and undue influence of persons benefited thereby, which was dismissed with costs. On appeal to the Court of Appeal, the Court being equally divided, the decree stood. But BURTON and PATTERSON, JJ. A., were in favour of the appeal being allowed, being of opinion that the evidence shewed a want of spontaneity or volition on the part of the testator, necessary to the making of a valid will.

In the case we are considering, no instructions whatsoever were given by the testator as to what his will should

Judgment. contain. The instructions came from the husband of the
MacMahon, person who under the terms of the first will would have
J. become possessed of the whole of the testator's estate, and
who under the second will was one of the principal beneficiaries. The mere reading of the will would not convey to a man in the then physical and mental condition of the testator, and with his limited education, what was included in the comprehensive words, "all my property of every name and kind, both real and personal;" and there was not a word of explanation furnished by the person who prepared the will as to what the language meant, even had Freeman been in a condition to comprehend the explanation. When Freeman was unable to write his signature to the will, Hamilton asked if he would help him to write it, to which question, from inability to articulate, or from some other cause, Freeman did not reply, but only nodded his head, and being held up in the bed Hamilton assisted him to make the signature appended to the will.

In the summing up of Sir James Hannen, in the case of *Burdett v. Thompson*, reported in a note to *Boughton v. Knight*, L. R. 3 P. & D. 64, at p. 73, he says in reference to the degree of soundness required to make a will: "From the character of the act it requires the consideration of a larger variety of circumstances than is required in other acts, for it involves reflection upon the claims of the several persons who by nature, or through other circumstances, may be supposed to have claims on the testator's bounty, and the power of considering these several claims, and of determining in what proportion the property shall be divided amongst the claimants; and, therefore, whatever degrees there may be of soundness of mind the highest degree must be required for making a will."

There was neither consideration nor reflection on the part of Freeman, and his mind appears at that time to have been in such a torpid state as to have been incapable of either consideration or reflection.

I do not agree with the learned trial Judge in his view, that the will should be set aside because of undue influence.

The undue influence which will set aside a will "must amount to force and coercion, destroying free agency; it must not be the influence of affection or attachment; it must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act; further, there must be proof that the act was obtained by this coercion; by importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear:" Williams on Executors, 8th ed., pt. 1, Bk. 2, ch. 1, p. 48, sec. 2, cited by Lord Penzance in his judgment in *Parfitt v. Lawless*, L. R. 2 P. & D. 462, at p. 470.

Judgment.
MacMahon,
J.

There was no evidence of force or coercion on the part of Mrs. Wright or her husband to induce Freeman to make the will in question.

What was done by drawing the will of a person in the physical and mental condition in which Freeman then was, without a word of instruction from the testator, containing a devise of the whole of the testator's estate, without bringing home to his mind (were he capable of being made to understand) the effect of his testamentary act, amounted to a greater or less degree of fraud on the part of the person who prepared the will, and of those who were present and taking benefits under the will the testator was asked to execute: See Lord Cairns's judgment in *Fulton v. Andrew*, L. R. 7 H. L. at p. 463.

The judgment pronounced by the learned trial Judge, will be varied by ordering that the defendant Harriet Wright is entitled to the amount of the deposit receipt as a good *donatio mortis causa*. Otherwise the judgment is confirmed, and the defendant's motion dismissed with costs.

GALT, C. J., concurred.

ROSE, J., was not present at the argument and took no part in the judgment.

[COMMON PLEAS DIVISION.]

CANADA PERMANENT BUILDING SOCIETY V. TEETER ET AL.

Mortgage—Power of sale without notice—Action to recover land without leave required by sec. 30, R. S. O. ch. 102.

A power of sale in a mortgage authorized a sale without any notice. Default having been made in payment of the mortgage moneys notice of sale was given exercisable forthwith. Shortly afterwards an action was brought by the mortgagees for the possession of the mortgaged premises without the leave of a judge, as required by sec. 30, of R. S. O. ch. 102, having been first obtained.

Held, that the Act did not apply, there being no proviso for notice in the mortgage.

Statement.

THIS was an action brought by the plaintiffs, the Canada Permanent Loan and Savings Company, against Henry Teeter and Michael Demain to recover possession of the north part of lot 23 in the 8th concession of the township of Clinton in the County of Lincoln, for default in payment of two mortgages executed by the defendant Henry Teeter. The other defendant Michael Demain was his tenant.

The action was tried before FALCONBRIDGE, J., at St. Catharines, at the Autumn Assizes of 1889.

Notice had been given for a jury, but the learned Judge dispensed with it and tried the case without a jury.

The defendants set up that at the time of the commencement of the action the plaintiffs had given a notice to the said Henry Teeter pursuant to a proviso alleged to be contained in the said mortgages requiring payment of the money secured by such mortgages and declaring an intention to proceed under and exercise the power of sale alleged to be contained in such mortgages, and the time at or after which according to which demand the power of sale was to be exercised or proceeded under had not elapsed, and the plaintiffs commenced this action without having first obtained an order permitting the same from a Judge of the County Court or from a Judge of the High Court.

The mortgage upon which this action was brought con- Statement.
tained the following power of sale :—

“Provided that the company on default of payment for two months may without any notice enter upon and lease or sell the said lands for cash or credit.”

Notice of sale had been served on the mortgagor in May, 1889, and required payment of the moneys secured by the mortgages to be made forthwith, and the action was not commenced until a reasonable time after service of the notice.

The writ was issued on the 11th day of June without an order from a Judge of the County Court or from a Judge of the High Court.

The learned Judge was of opinion that as the time at which the demand for the payment of the money was made was “forthwith,” and as the proceedings were not in fact taken until a reasonable time after that he did not think he could give effect to the objection founded on the R. S. O. ch. 102 section 30 (1887); and he found for the plaintiffs.

The defendants moved on notice to set aside the judgment entered at the trial in favour of the plaintiffs, and to enter judgment for the defendants.

In Michaelmas Sittings, November 21st, 1889, *Lancaster* supported the motion. The action should not have been commenced without having obtained an order from a Judge of the County Court, or from a Judge of the High Court, in pursuance of section 2 of the Ontario Mortgage Act, 47 Vic. ch. 16 (O.), sec. 30 of R. S. O. ch. 102. The learned Judge at the trial had no power to dispense with the jury.

C. Robinson, Q. C. and *E. E. A. Du Vernet* contra. The mortgage in the present case stipulates that no notice need be given. The contract of the parties will not be interfered with: *Grand Trunk R. W. Co. v. Vogel*, 11 S. C. R. 612, 631; *Clark v. Harvey*, 16 O. R. 159; *Re Gilchrist and Island*, 11 O. R. 537. The Mortgage Act does not say that notice

Argument.

must be given, it only says, "that where pursuant to any condition or proviso contained in the mortgage there has been made or given a demand or notice." Here there was no proviso in the mortgage for notice, and the Act does not apply. It has been held that a power of sale is good without notice: *Re British Canadian Loan and Investment Co. and Ray*, 16 O. R. 15. The objection as to dispensing with the jury is disposed of by the case of *Marks v. Corporation of Windsor*, 17 O. R. 719. Section 80 of R. S. O. ch. 44 (1887) now expressly authorizes the Judge to dispense with the jury.

December 21, 1889. GALT, C. J.:—

[The learned Chief Justice, after discussing some objections argued, but which are not now material, proceeded:]

The fourth statement is really the only one to be considered, as it involves the construction of an important clause in the "Act respecting Mortgages of Real Estate," I will set it out:

"The defendants say further that at the time of the commencement of this action the plaintiffs had given a notice to the said Henry Teeter (the mortgagor) pursuant to a proviso alleged to be contained in the mortgages mentioned in the first paragraph of the statement of claim, requiring payment of the money secured by such mortgages, and declaring an intention to proceed under and exercise the power of sale alleged to be contained in such mortgages, and the time at, or after which, according to such demand, the power of sale was to be exercised or proceeded under, had not elapsed, and the plaintiff commenced this action without having first obtained an order permitting the same from the Judge of a County Court, or from a Judge of the High Court."

The Act upon which this statement of defence is based, was passed after the execution of these mortgages; but as there is no clause limiting its application to mortgages subsequently executed, it is applicable to the present case

if there is any condition or proviso contained in these mortgages pursuant to which "any demand or notice requiring payment, or declaring an intention to proceed under and exercise the power of sale has been made." Judgment.
Galt, C.J.

Upon referring to the mortgages, it will be found there is no such proviso or condition; but, on the contrary, it is expressly provided: "That the company on default of payment for two months, may, without any notice, enter upon and lease and sell the said lands for cash or credit."

R. S. O. (1877), ch. 104, contains a special provision (14) to which the Act of 1884, 47 Vic. ch. 16 (O.), now in force, would apply: "Provided that the said mortgagee on default of payment for — months, may on — notice, enter on and lease or sell the said lands." But it is also enacted by the same statute, by sec. 3, "Any such mortgage or part of such mortgage" (namely, mortgages expressed to be made in pursuance of this Act), "which fails to take effect by virtue of this Act, shall nevertheless be as effectual to bind the parties thereto, so far as the rules of law and equity will permit, as if this Act had not been made;" and from the terms of these mortgages the said sec. 14 does not apply; and therefore the parties are bound by their contract.

This defence therefore fails.

There was also an objection on the ground that the learned Judge had dispensed with a jury after notice therefor had been given by the defendants. By sec. 80 of R. S. O. ch. 44 (1887), the learned Judge at the trial is expressly authorized to do what was done in this case, and we see no reason why we should interfere with his judgment.

ROSE, J. :—

I quite agree. Judgment was reserved only to consider the last ground, and, as to that, I concur in the opinion expressed by the learned Chief Justice.

Mr. Robinson referred to *Grand Trunk R. W. Co. v. Vogel*,

Judgment.

ROSE, J.

11 S. C. R. 612, at p. 631, as to the principle of construction, where it is stated that "it is a universal principle of statutory construction that every presumption must be made against an intention to interfere with the freedom of contract."

Reference was also made to *Clark v. Harvey*, 16 O. R. 159, and Mr. Robinson pointed out that in it no reference is made to *British Canadian Invs. Co. v. Ray*, 16 O. R. 15, a decision of our learned brother Street, who sat with us in *Clark v. Harvey*.

The objection as to dispensing with the jury was clearly not tenable: *Marks v. Corporation of Windsor*, 17 O. R. 719.

MACMAHON, J., concurred.

Motion dismissed with costs.

[CHANCERY DIVISION.]

Re McLEAN AND WALKER.

Sale of land—Agreement—When payment to be made—Title—Prior mortgage—Time to take possession—Interest.

In an agreement for the sale of land it was provided that the cash payment should be made and the mortgage for the balance given "so soon as the solicitors for the purchaser shall be satisfied with the title":—*Held*, that the meaning of the contract was that payment was not to be required, until such title was shown as would justify the purchaser in taking possession, and following *Wells v. Maxwell*, 32 Beav. 552, that no satisfaction being given as to a prior mortgage affecting the land until two years after the agreement, the purchaser could not prudently take possession until then, and interest on the purchase money should only be allowed from that time.

THIS was an application under the Vendor and Purchaser Act, R. S. O. ch. 112.

An agreement in writing had been entered into on October 10th, 1887, between A. G. McLean, as vendor, and E. C. Walker and R. J. Hodge, as purchasers, for the sale and purchase of certain land for the sum of \$5,600, payable as follows: "\$1,200 so soon as the solicitor for the purchasers shall be satisfied with the title, and the balance of \$4,400 by a mortgage to run for five years with interest at six per centum per annum, payable half yearly, &c."

The ordinary requisitions on title were satisfied soon after the date of the agreement, but the holders of a mortgage on the premises declined to discharge it until some accounts between them and the vendor were settled up, which was not done until October, 1889. It also appeared that the agreement had been left in the hands of a land agent, but had, without the knowledge or consent of the vendor, been borrowed from him soon after it was signed, on behalf of the purchasers, and registered. The lands were vacant.

The petition came up for argument on April 2nd, 1890 before BOYD, C.

Argument.

Moss, Q.C., for the purchaser. The question in dispute is as to the time from which the purchaser should pay interest. The agreement was made in October, 1887. The purchasers' solicitor discovered a mortgage existing upon the premises, which the holders refused to discharge until October, 1889; the cause of the delay being some unsettled accounts between the mortgagees and the vendor, with which the purchaser had nothing to do, and as the agreement provided for the payment of the cash instalment and the giving of the mortgage for the balance "so soon as the solicitor for the purchasers shall be satisfied with the title," the purchasers could not prudently take possession until the mortgage was discharged, and so should not pay interest until the mortgage was removed. I refer to *The Peoples' Loan, &c., Co. v. Bacon*, 27 Gr., 294; Fry on Specific Performance of Contracts, 2nd ed., secs. 1372, 1373; *Boulton v. Bethune*, 21 Gr. 110 and 478; *Cameron v. Carter*, 9 O. R. 426; *Binks v. Lord Rokeby*, 2 Swanst., at p. 226; Dart on Vendors and Purchasers, 6th ed., 711; *In re Burroughs, Lynn, and Sexton*, 5 Ch. D., 601.

H. Cassels, for the vendor. Interest should be paid from the date when the requisitions on title were answered or at the very latest from the time the purchasers registered the agreement. That act was evidence of satisfaction by the purchasers' solicitor. The mortgage was not an objection to the title but was a mere matter of conveyancing. When the objections to the title were made and answered the title was satisfactory. The authorities cited on behalf of the purchasers are not applicable to this case, as they were decisions in cases where no time was fixed and nothing was said about interest: both of those elements appear here. No tender of any conveyance or of the mortgage was made and no cash payment was made. I refer to *Vickers v. Hand*, 26 Beav. 630; *Lord v. Stephens*, 1 Y. & C. (Ex.) 222.

Moss, Q.C., in reply. The production and registration of the discharge of the mortgage was required and was not satisfied.

April 2, 1890. BOYD, C.:—

Judgment.

Boyd, C.

The only time fixed for completion is when "the solicitor for the purchasers shall be satisfied with the title." There is no evidence that he has ever expressed satisfaction, though it is to be inferred that reasonable satisfaction was made as to all questions of title in its strict sense upon the answers to the purchasers' requisitions. But there was then a question raised as to a prior mortgage which affected this land and no satisfaction was afforded as to that till about October, 1889. The fair and reasonable meaning of the contract appears to be that payment was not to be required till such a title was shewn as would justify the purchasers in taking possession.

I had occasion to consider the matter of interest in *Rae v. Geddes*, 3 Ch. Ch. 404, which is in point as to the present case. One of the cases there referred to, *Wells v. Maxwell*, 32 Beav. at p. 552, affords an apt citation: "The rule is, that interest is to be given from the time when the purchaser could prudently take possession, but I do not think a purchaser could prudently take possession on the title being perfectly well shewn, if it appeared that the property was mortgaged to its full amount, and that there was no assurance that the mortgagee would join the conveyance, and it was not known whether the vendor could get him to join. It is true that this is a matter of conveyance, but the purchaser does not know that you can get the mortgagee's consent to it."

The disagreement as to interest here arises from the ambiguity of the contract, and while I construe it in favour of the purchaser, I think it is not a case for costs. Interest should run on all the price from October, 1889, at which time possession might have been prudently taken by the purchasers.

G. A. B.

[CHANCERY DIVISION.]

SIBBALD V. GRAND TRUNK R. W. ET AL.

TREMAYNE V. GRAND TRUNK R. W. ET AL.

New trial—Action for negligence—Death between verdict and judgment—Damages—Jurisdiction—Railways and railway companies—Level crossing—Liability.

Where in an action for damages against a railway company, one of the parties to whom damages were awarded, who was an infant, died after verdict and before judgment, and the verdict was now moved against, on the ground of excessive damages :—

Held, That the Court to prevent injustice had power to grant a new trial, which was ordered unless the damages given to the deceased child were reduced to a sum commensurate with the expense caused to the mother's estate by its illness and maintenance.

Semble, That where a railroad crosses a public highway at a level crossing, and it is open to observation that the highway is in a dangerous state, liability will rest upon the operating company for resulting accident, even although a different company was responsible for the original faulty construction of the railway roadbed which led to the unsafe condition of the highway.

Statement.

THESE were two actions brought, one by Francis C. Sibbald, and the other by Frank G. Tremayne and his wife, the administrator and administratrix of Mrs. Anderson, deceased, against the Grand Trunk Railway Company and the Midland Railway Company, for damages arising from alleged negligence on the part of the defendants, under circumstances not necessary to report at length. The second action was brought for the benefit of the two children of Mrs. Anderson, who was killed in one of the accidents in question.

The defendants pleaded "not guilty by statute," the Grand Trunk Railway Company referring to C. S. C. ch. 66, sec. 83 ; 51 Vic. ch. 27, sec. 287, (D.), and the Midland Railway Company to 51 Vic. ch. 29, sec. 287, R. S. O. 1887, ch. 170, sec. 42, and 45 Vic. ch. 67, sec. 8 (O.).

The two actions came on for trial together before STREET, J., and a jury, at the Toronto Fall Assizes, 1889, and verdicts were given and judgments entered for the plaintiffs.

The present motion was made by the defendants to the *Statement*. Divisional Court by way of appeal from the above verdicts and judgments, and came on for argument on December 17th, 1889, before BOYD, C., and ROBERTSON, J.

Osler, Q. C., and *Nesbitt*, for the defendants.

Shepley and *Burns*, for the plaintiffs.

March 14th, 1890. BOYD, C. :—

Having read all the evidence, the Judge's charge, and the findings of the jury, I am not able to distinguish this case in substance from the case of *Rosenberger v. Grand Trunk R. W. Co.*, 8 A. R. 482, and 9 S. C. R. 311. The jury have found, not against the weight of evidence, that the statutory obligations as to notes of warning to be given upon engines approaching road crossings were not complied with, and that this omission was contributory to the accident. It is easy to see how the evidence led them to conclude as they did. The highway at the point where the accident occurred was materially narrowed upon the construction of the railway track, so as to leave it in a dangerous condition for wheeled vehicles. The highway sloped south to the railway crossing, and was narrowed to about sixteen feet, with a ditch on either side, which made it impracticable to handle horses so as to turn in the face of an approaching engine. Upon this narrow piece of road the plaintiff had driven before he was aware of the engine approaching towards him. The engine was then at a distance of some 200 or 300 yards, and was coming at the rate of six or eight miles an hour, when first in sight of the travellers; it was too late for the plaintiff, the doctor, to extricate himself and his vehicle from this position of danger, and taking the best precautions he could he had to abide the result of the passing engine. The jury evidently believed and in effect find that, had the whistle been sounded or the bell been rung at intervals as directed by the statute, the defendant would have been warned not to come

Judgment. down the slope of the hill, and so would have avoided
Boyd, C. being hampered by the narrowness of the roadway. The jury find that with the exception of the whistling, which was done as the engine started, more than eighty rods from the crossing, no other note of warning was sounded. This whistling must have been some time before the plaintiff reached the brow of the hill, and was either not heard by him or conveyed no indication as to the movement in his direction. According to the evidence, it was impossible on account of over-hanging trees for him to see the engine sooner than he did, which would be when it was about the cattle guard, a distance of some 280 feet from the crossing, and when he was half way down the slope of the hill, and about 150 feet from this crossing.

The hazardous condition of the travelled road is obvious to any passer by, and the engineer of the defendants admits that he was acquainted with the place, though he did not consider it specially dangerous more than other level crossings. The jury have, therefore, thought it to be a place where, for two-fold reasons, great precaution should have been used, and they find that not even the warning which the statute prescribes was given.

It does not appear to me needful to consider the liability of this company for the unsafe condition of the highway arising from the original construction of the track and road bed some ten years ago by the Simcoe Junction Railway, as to which I find no express decision. My impression is, that the dangerous state of the public road being open to observation, liability would rest upon the operating railway, though it was not responsible for the original faulty construction. Had the highway at this point been of the width it was before the railway came there, then people driving to the crossing would have been able to extricate themselves even at the eleventh hour; but the narrowed way shuts them up to face the danger without alternative. However, as I regard the evidence and findings, the verdict may rest upon ground covered by the decision in the Rosenberger case.

The verdict in favour of the children of Mrs. Anderson, was also moved against on the ground of excessive damages; to the younger, aged ten, \$3,200 was awarded; to the elder, aged thirteen, \$2,800. Since verdict and before judgment, the elder has died. It is shewn by affidavit that he injured himself in the Christmas holidays of 1888, after the death of his mother, and was sent for treatment to the Toronto hospital. He was there from March, 1889, till June, 1889, and I should infer he never thoroughly recovered from the effect of this injury.

Judgment.

Boyd, C.

The trial was concluded on September 14th, 1889, and his death was on the 29th of the same month. The nearest practice in such cases is derived from actions for personal injuries. These do not abate, though the plaintiff dies after verdict and before judgment, by virtue of legislation in that behalf. [See C. S. U. C. ch. 22, sec. 139; R. S. O. 1877, ch. 50, sec. 236; *Udy v. Stewart*, 10 O. R. at p. 602, and Con. Rule 620.] If such damages are given as is likely to work injustice in case death intervenes as here, between verdict and judgment, the Court has power to interfere by granting a new trial. See per Bramwell, B., in *Kramer v. Waymark*, L. R. 1 Ex. 241, 244. To the other child, a very liberal verdict is given, but the Court is becoming less and less disposed to interfere in matters of this kind, where no other element intervenes. The one test (assuming right to any damage) is, are the damages so large that no jury could reasonably have given them? *Praed v. Graham*, 24 Q. B. D. 53. This particular case was one of libel, but the observations of the Court are pertinent to cases of negligence or personal injury. No fault can be found with the Judge's charge, which was very full, clear, and fair. But having regard to the death of one child since verdict, and noting that the expenses occasioned to the estate of the mother by the illness and maintenance of that child, is said to be from \$375 to \$400, I think the proper disposition of this branch of the application will be to say that judgment should be affirmed with costs, if the plaintiff agrees to reduce the damages as to,

Judgment. the deceased child to the sum of \$400. If this is declined,
Boyd, C. there should be a new assessment of damages as to the
children, with costs of this application reserved to be dis-
posed of by the trial Judge.

ROBERTSON J., concurred.

A. H. F. L.

[CHANCERY DIVISION.]

BLACKLEY V. KENNEY ET AL.

Mortgage—Security for present and future advances — Payment—Land held in suretyship—Giving time by renewals—Release of land—Parties—Creditors' rights—Evidence.

One of the defendants, who was the husband of another of the defendants, mortgaged certain lands to the plaintiff, a member of a mercantile firm, to secure an existing indebtedness to the firm and future advances. Subsequently the husband, by the advice of the plaintiff, conveyed his equity of redemption in the lands to his wife, subject to the mortgage. At the time of this conveyance, the debt due the plaintiffs' firm was represented by notes under discount which, as they fell due, were retired by the firm, the husband making part payments thereon, procuring fresh goods from the firm, giving renewals for the balances and getting delivery up of the original notes, the wife not being consulted as to these dealings, and rights against her not being reserved. The husband subsequently made an assignment under R. S. O. ch. 124.

In an action for that purpose the conveyance to the wife was declared fraudulent and void as against creditors, but not as against the creditors' assignee, it having been made before the Assignment and Preferences Act : *Ferguson v. Kenney*, 16 A. R. 272.

In the present action on the plaintiff's mortgage, it was held by the Court of Appeal that the plaintiff was estopped from disputing the validity of the conveyance to the wife, and that the mortgaged lands were not chargeable with advances made after notice of such conveyance, and the action was referred back to an Official Referee (16 A. R. 522).

On a second appeal from the Referee's report :—

Held, that the course of dealing of plaintiff's firm did not operate as a payment of the original notes or debt : *Dominion Bank v. Oliver*, 17 O. R. 432, followed. But

Held, that the wife, at the time of the conveyance to her, became a surety in respect of the lands, and that the renewal of the notes by the plaintiff's firm discharged the lands from liability.

Held, also, following the judgment in *Blackley v. Kenney*, *supra*, that the mortgage was not a security for advances made after the conveyance to the wife, nor could the plaintiff's firm claim as simple contract creditors against the lands, nor could the creditors' assignee, who was a defendant in this action, claim on behalf of the other creditors, whether execution creditors or otherwise, they not being parties to this action.

A certified copy of the certificate of the Court of Appeal of the result of an appeal in an action is not evidence of the judgment therein in another action between different parties.

THIS was an appeal from a second report of an Official Statement.
Referee, the first having been set aside by the Court of Appeal. See 16 A. R. 522.

The following statement is taken from the judgment of
ROBERTSON, J. :

Statement.

This was an appeal from the report of John Winchester, Esq., referee, dated the 15th January, 1890, in a mortgage action brought by the plaintiff as trustee and mortgagee for the firm of D. McCall & Co., of which the plaintiff was a member, against the defendant John Henry Kenney as mortgagor, and the defendant Margaret Jane Adelaide Kenney, claiming to be the owner of the equity of redemption, by virtue of a deed from the mortgagor, bearing date 1st September, 1884; and the defendant Ferguson who also claimed to be entitled to the equity of redemption in the property described in the said mortgage for the benefit of the creditors of the said John Henry Kenney, on the ground that the deed to the defendant Margaret Jane Adelaide Kenney is void as against creditors.

The facts are as follows :

On 17th January, 1883, the defendant John Henry Kenney gave to the plaintiff, trustee for the firm of D. McCall & Co., of which he was a partner, a mortgage on real estate in Toronto, to secure a present indebtedness of \$2,000, and as collateral security for the payment thereof, and future advances, &c. The proviso is in these words : "Provided, this mortgage to be void on payment of all moneys due or hereafter to become due by the mortgagor to the said firm of D. McCall & Co., or to the mortgagee as representing the said firm for purchases, cash advances, interest, or otherwise. It being intended that this mortgage is given as collateral security for all moneys due or to become due from the said mortgagor to the said firm of D. McCall & Co. or to the said mortgagee."

Afterwards on the 1st September, 1884, the said defendant John Henry Kenney by deed of that date, conveyed his equity of redemption in the same land to one James D. Smith, to the use of Margaret Jane Adelaide Kenney, the wife of John Henry Kenney, her heirs and assigns, to and for her and their sole and only use forever, subject to the above mentioned mortgage, which he John Henry Kenney covenanted to pay off and discharge when due.

The plaintiff, the mortgagee, had full notice of this deed,

and advised that it should be given ; and at the date of it, Statement.
the indebtedness of John Henry Kenny to D. McCall & Co.
and the plaintiff was represented by ten promissory notes,
made by him to that firm, amounting together to the sum
of \$4,375.14, and none of which was due at the time.
The mortgagor continued to deal with D. McCall & Co.,
and as each of the foregoing notes matured, they having
been discounted by the firm of D. McCall & Co., at the
Imperial Bank of Canada, were and each of them was
retired by the cheque of that firm ; the maker John Henry
Kenny having paid some money on account and given a
renewal note for the balance. These renewal notes were
payable at future days, and were also discounted by the
firm. As each of the original notes was retired, the plain-
tiff or his firm cancelled and delivered it up to the maker.
By the 11th February, 1885, the whole of the original
notes had been taken up and disposed of as above.

The defendant John Henry Kenney having become in-
solvent made an assignment for the benefit of his credi-
tors to one Ferguson, who brought an action to set aside
the conveyance from Kenney to his wife, joining with him
in bringing the action against Tait, Burch & Co., creditors.
In this action the conveyance was declared fraudulent and
void as against creditors, but the action was dismissed as
regards the creditor's assignee, Ferguson (See 16 A. R. 276).

The plaintiff on behalf of his firm brought an action
on the mortgage, claiming that the same was a security for
the amount due his firm, and on a reference to an Official
Referee, who found the sum of \$4,083.52 due them, this
sum including purchases and advances made after the
conveyance to the wife. His report was upheld by the
Chancellor, but the latter's judgment was reversed by the
Court of Appeal, who held that the plaintiff could not
charge against the land, under his mortgage any advances
made after notice of the conveyance to the wife (see 16
A. R. 522).

The report states as follows :

2. The amount due the plaintiff under and by virtue of

Statement. his mortgage security in the pleadings mentioned on the first day of September, 1884, being the date of the conveyance from the defendant John Henry Kenney to his wife the defendant Margaret Jane Adelaide Kenney, was the sum of \$4375.14, and deducting therefrom all payments made thereon, and adding interest on the balances from time to time, there was due to the plaintiff on the 30th day of June, 1888, date of my former report herein, by virtue of the notes given by the defendant John Henry Kenney, on or before the said first day of September, 1884, for the said sum of \$4375.14, and renewals of such notes, the sum \$2553.33, and adding interest thereon at the rate of six per cent. per annum from such last mentioned date to the date hereof, amounting to the sum of \$236.69, make together the sum of \$2790.02, payable out of the lands in question herein in priority to all other claims.

3. I have taken an account of the amount due to the defendant John Ferguson, representing the creditors of the defendant John Henry Kenney, and have set out the several sums in the schedule hereunder written.

4. Pursuant to the certificates of the Court of Appeal in the suits of *Ferguson v. Kenney*, and *Blackley v. Kenney* the defendant Margaret Jane Adelaide Kenney is entitled to the equity of redemption in the said lands upon payment of the sums found due in the two preceding paragraphs.

5. I find at the request of the defendants John Henry Kenney and Margaret Jane Adelaide Kenney, that all the promissory notes which were held by the plaintiff (or the firm of D. McCall & Co.,) and which represented the indebtedness of the defendant John Henry Kenney to the plaintiff, and the said firm, on the said 1st day of September, 1884, were taken from the bank where they had been discounted and cancelled by the plaintiff or his said firm as they fell due, and returned by the plaintiff or his said firm to said John Henry Kenney, upon the said John Henry Kenney paying such notes or giving a renewal for the amount remaining due and unpaid on such notes. And

that the defendant Margaret Jane Adelaide Kenny was not a party to the making of the renewal notes mentioned in the second paragraph hereof. And that neither the plaintiff nor his said firm reserved any rights against the said defendant Margaret Jane Adelaide Kenney when they took the said renewal notes, other than any rights they were entitled to under the mortgage security herein.

The appeal was argued on February 8th, 1890, before ROBERTSON, J.

A. C. Galt for the defendants Kenney, who appealed. The Court of Appeal decided that any advances made to Kenney after the date of the deed to his wife could not be charged against the mortgage. The mortgage debt at the date of the deed was represented by ten promissory notes. The action of the plaintiff's firm in taking up, cancelling and returning those notes to Kenney operated as payment of the debt secured by the mortgage, and the personal liability of Kenney was accepted in lieu thereof: *Mickle v. Bowslaugh*.*

The cash payments made after the date of the deeds should all go in reduction of the mortgage debt: *Devaynes v. Noble*, *Clayton's Case*, 1 Mer., at pp. 585, 608. The deed to the wife having been made with the knowledge and concurrence of the plaintiff, she became in respect of the land a mere surety for the payment of the then existing mortgage debt, so that the extension of time and acceptance of renewals without reserving any rights against her operated as a discharge of the land in her hands: *The Royal Canadian Bank v. Payne*, 19 Gr. 180; *Canadian Bank of Commerce v. Green*, 45 U. C. R. 81; Brandt on Sureties, §§ 19, 21, 22, 24. The payments made by the plaintiff's firm to their bankers in taking up the notes were subsequent advances within the meaning of the judgment of the Court of Appeal. As regards the claim of the defendant Ferguson, there is no evidence in this case im-

* Not yet reported.—REP.

Argument.

peaching the deed to the wife. The judgment in *Ferguson v. Kenney*, 16 A. R. 276, is not evidence in this action as the plaintiff here was not a party to that action: Daniel's Chancery Practice, 6th ed. 596; Bigelow on Estoppel, 4th ed. 98, 99; *Blackley v. Kenney*, 16 A. R. 522. The creditors were not made parties but chose to be represented by Ferguson, and their rights must depend on his status: *The Commissioners of Sewers, etc. v. Gellatly*, 3 Ch. D. 610; *Morrison v. Robinson*, 19 Gr. 480, at p. 486. They cannot come in now and have the case tried over again: *Glasier v. Rolls*, 42 Ch. D. at p. 459. Even if the deed to the wife was void as against Ferguson she is entitled to priority in respect to her inchoate right to dower: *The Bank of Upper Canada v. Thomas*, 2 E. & A. 502. By registering her deed and the judgment of the Court of Appeal, the wife has acquired priority over Ferguson and all the creditor's claims which he represents: *Mutual Life Assurance Society v. Langley*, 32 Ch. D. 460.

Walter Macdonald for the plaintiff. The referee has found that the accounts were kept by specific application of payments and notes for balances. When new goods were bought they were paid for in cash in many instances. The total amount of cash paid by Kenney would not pay off the mortgage. If renewals were given the plaintiff can still rely on the original consideration, viz., the money debt due before the first notes were given. The judgment of the Court of Appeal, holding the deed to Mrs. Kenney voluntary, was before the referee in this suit, and the plaintiff is entitled to the benefit of it: *Gillies v. Howe*, 19 Gr. 32. The plaintiff is entitled to charge all the subsequent and continuing advances against the lands: *Cameron v. Kerr*, 3 A. R. 30. The renewals were a mere continuation of the original debt, and were still chargeable against the mortgage: *Dominion Bank v. Oliver*, 17 O. R. 402. This case differs from *Royal Canadian Bank v. Payne*, because the bank's assignor there had not taken subject to a mortgage, there had been enough money paid to pay off the mortgage, and value had been given, all of which elements are wanting

in this case, as Mrs. Kenney took subject to a registered mortgage, expressly providing for renewals, and in any event should not be relieved to any greater extent than the cash paid on the debt due at the date of the deed to her.

Geo. Kerr, Jr., for Ferguson, the assignee. Each creditor's debt is separately set out in the referee's schedule, so that Ferguson having represented them all does not affect their status. Kenny's evidence admits the debts. I refer to *McCall v. McDonald*, 13 S. C. R. 247; *Ferguson v. Kenney*, 16 A. R. 276.

A. C. Galt in reply. In *Gillies v. Howe* the evidence was used by consent. In *Dominion Bank v. Oliver* there was no money or other consideration paid at all. In *Cameron v. Kerr*, no deed was made and no other parties were claiming. The creditors may be mentioned in a schedule, but they are not parties. If the plaintiff's contention that the defendant is estopped from asserting the validity of the deed by the judgment in *Ferguson v. Kenney*, 16 A. R. 276, the defendant's answer is, that the plaintiff and Ferguson are estopped from disputing the deed by the judgment in this case, 16 A. R. 522, and estoppel against estoppel leaves the matter at large; Everest and Strode on Estoppel, p. 7, Bigelow, 4th ed., 349 and 350. As to relative rights of the plaintiff and the appellants after the date of the deed, see Fisher on Mortgages, 4th ed., 1187, 1193, 1633, and 1634.

February 17th, 1890. ROBERTSON, J. :—(After stating the facts as above.)

The defendants, the Kenneys, now contend as follows :

1. That by cancelling and returning to the maker all these notes, and accepting the renewal notes, the plaintiff and his firm elected to abandon whatever rights they had upon the former notes, and the plaintiff's course of dealing in reference to said notes operated as payment of the original notes, and the original debt for which they were given.

Judgment. 2. That after the conveyance of 1st September, 1884, to Robertson, J. the defendant Margaret Jane Adelaide Kenney, she became in respect to the said lands, a surety for the payment of the then existing notes, the defendant, John Henry Kenney, being the principal debtor, and the plaintiff's said firm taking the renewal notes, and thereby extending the time of payment without reserving any rights against the surety, whereby she became discharged.

3. That no liability attached on the said mortgage security for advances made by the plaintiff's firm to the defendant John Henry Kenney, or for him, subsequent to the date of the said conveyance of 1st September, 1884.

As to the first contention, the case of *Dominion Bank v. Oliver*, 17 O. R. 402, is an express authority against it; as in that case, so here, there was no payment in fact of the notes or the debt for which the mortgage was given; at their maturity they were taken up by substitution of renewal notes, and a small amount paid on account, which in the whole only amounted to \$320; and these renewals were afterwards taken up by other renewals, and so on; but no other money or other consideration ever passed from the mortgagor to the plaintiff or his firm during this course of dealing in respect of the debt itself represented by the original notes, and which debt the mortgage was given to secure.

In *Carruthers v. Ardagh*, 20 Gr. 579, at p. 593, the late Chancellor Spragge, says: "Upon the dishonour of a bill or note given as collateral security, *the original cause of action survives*, &c., * * It seems to me quite immaterial whether the giving of a note or a bill, for the amount of a debt is to be considered as operating as a suspension of payment, or as a conditional payment; whichever it be, the original cause of action revives, upon default in payment of the note or bill. * * It is, in short, as a general rule, merely collateral security. * * The cases entirely negative the proposition that the mere taking of such note or bill, does of itself import that it is taken *in accord and satisfaction*." And in *Dominion Bank v. Oliver*, Boyd,

C., at p. 405, also says : "The whole series of notes and renewals form links in one and the same chain of liability, which is secured by the mortgage." I quite agree with this, and therefore in my judgment the first ground of objection utterly fails.

As to the second contention. The conveyance of the equity of redemption from John Henry Kenney of 1st September, 1884, contains in the *habendum* the proviso, "subject nevertheless * * a certain mortgage to Wm. Blackley, dated 17th January, 1883, which the party of the first part (John Henry Kenney) hereby covenants and agrees to pay off and discharge when due. At the date of this conveyance the debt secured by the mortgage referred to was that for which the before mentioned ten promissory notes had been given ; as these several notes became due, time for the payment of them, was given without the consent of the owner of the equity of redemption, who had by reason of her having accepted the conveyance, become surety in respect of the land. The rule governing in a matter of this kind is that 'when property of any kind is mortgaged or pledged by the owner to answer for the debt, default, or miscarriage of another person, such property occupies the position of a surety, or guarantor, and any thing which would discharge an individual surety or guarantor who was personally liable will under similar circumstances discharge such property.'"

In *Samuell v. Howarth*, 3 Mer. 272, A. guarantees the payment of any goods to be applied by B. to C. between the 2nd of April, 1814, and the 2nd of April, 1815. *Although no period of credit was specified, this could not be taken as a guarantee for an unlimited period, but to be restrained by the usual course of trade ;* and C. having accepted bills for the amount of the goods delivered, which B. permits him to renew, when payable without any communication to A. on the subject of such renewals : *Held*, that A. was discharged from his guarantee, by virtue of the rule that a creditor giving further time to the principal debtor, without the consent of the surety, releases the

Judgment. surety. And that, although it was proved that the renewal Robertson, J. was given only in consequence of C's inability to pay, and that no injury could accrue to A.; the surety being himself the fit judge of what is, or is not, for his own benefit."

Lord Chancellor Eldon, in giving judgment said at p. 279: "The creditor has no right—it is against the faith of his contract—to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety."

And in *Royal Canadian Bank v. Payne*, 19 Gr. 180, the late Chancellor Spragge followed that decision, and discharged the surety. See also *Lord Harborton v. Bennett*, Beatty's Reports, (Ir. Ch.) 386.

A creditor who takes a bill or note from a debtor who is in default, impliedly gives him time since he cannot sue the debtor until the maturity of the bill or note: *The Croydon Commercial Gas Co. v. Dickinson*, 1 C. P. D. 707, affirmed in appeal, 2 C. P. D. 46. Likewise the renewal of a bill by the creditor may operate to discharge the surety, unless made with the assent of the latter: *Torrance v. The Bank of British North America*, L. R. 5 P. C. 246. But at the time the debt for which the original ten notes were given was contracted, the defendant Margaret Jane Adelaide Kenney had not become a surety. Nor was she such at the time the notes were given, except as to one, which was made on 1st October, 1884, for \$118.76; and the question arises as to whether that does not make a difference in regard to the effect of giving time for payment for each, by taking the renewals.

Mr. Brandt in his work on Suretyship, sec. 19, says: "If creditor knew of suretyship, when he did the act complained of, this is sufficient to secure surety his rights;" and he cites in support of that proposition the following American cases: *Bank of Missouri v. Matson*, 26 Mo. 243; *Colgrove v. Tallman*, 2 Lansing (N. Y.), 97; *Lauman v. Nichols*, 15 Iowa, 161, and *Wheat v. Kendall*, 6 New Hamp. 504. But as being contra, he refers to *The Bank of Upper Canada v. Thomas*, 11 C. P. 515, and *Pooley v. Harradine*, 7 E. & B. 431.

In the last mentioned case, the agreement was made as ^{Judgment.} to the suretyship, at the time the notes were made and ^{Robertson, J.} handed over to the plaintiff, and he received them with full notice of the fact, and it was held that a plea alleging that fact, and that the plaintiff had afterwards without the consent of the surety given time to the principal debtor, but for which he might have obtained payment, was good on demurrer. But in the same case the question is raised and not answered, whether the equity would have existed if the notice had been after the taking of the notes, *but before the giving of time*; and in *The Bank of Upper Canada v. Thomas, supra*, the declaration was on a promissory note made by the defendant and endorsed by one O. T. M. to the plaintiffs. Plea, on equitable grounds, that the defendant was surety for O. T. M., and made the note for his benefit without value, of which the plaintiffs became aware *after they became the holders thereof*, and after notice thereof gave time to O. T. M., and thereby released defendant. On demurrer held bad. The Court (Draper, C. J., and Hagarty, J.), holding that as the plaintiffs were not aware of the true state of affairs existing between the defendant (the maker) and O. T. M., the payee and endorsee, at the time they became the holders of the note, the defence was not allowable, and it was considered by these learned Judges, that the case of *Pooley v. Harradine* did not go so far as to decide that a subsequent knowledge was sufficient to enable the defendant to take advantage of the equitable doctrine relied upon in the plea, although Hagarty, J., at p. 517, said: "I gather from the language of Sir J. Coleridge, in delivering the judgment in *Pooley v. Harradine*, that he considers that Courts of Equity would probably relieve the surety if the creditor give time to the principal debtor, after knowledge of the existence of the relation, although he had no such knowledge at the date or the original transaction." And the learned Judge continues: "The inclination of my mind is to think that such would be the view taken. And this on the short ground that in the language of the case

Judgment. referred to, the defence does not arise by any alteration of the original contract, but that the creditor cannot fairly or equitably sue the surety when, knowing of the existence of the relation of principal and surety, he has voluntarily tied up his hands from proceeding against the principal.”

Robertson, J.

In *Davies v. Stainbank*, 6 D. M. & G. 679, it was held that a creditor who holds a floating guarantee from a surety cannot, without the surety's consent, give time to the principal debtor as to any portion of the debt, without reserving the creditor's rights against the surety, and yet hold the surety liable for that portion.

In order to apply these cases to the one now before me, it is necessary to review the facts and circumstances connected with the transaction and between the principal debtor John Henry Kenney and the plaintiffs from the beginning. The mortgage, which the plaininff is now seeking to enforce, was given as a continuing security, and so long as the equity of redemption remained in the mortgagor, the giving of time could not affect the case; but afterwards, and when the debt secured was ascertained to amount to the sum represented by the ten notes in question, and the date of their maturity fixed and agreed upon, the mortgagor conveyed, *at the instance and with the advice and co-operation of the plaintiffs*, the lands in the mortgage mentioned to the defendant Margaret Jane Adelaide Kenney, subject to the said mortgage. This transaction had the effect of making the grantee Margaret Jane Adelaide Kenney, a surety in respect of these lands, for the payment of these several promissory notes, but for nothing beyond that. These notes respectively matured at dates from 18th September to 18th November, 1884, and as they matured, the plaintiffs' firm at the request of the maker, James Henry Kenney, retired them in full, and renewal notes, made by the same maker, were taken in substitution, payable at dates extending the time of payment from one to several months: the original notes being cancelled by the plaintiff and handed back to the principal debtor, no consent being given by the surety,

nor were the rights of the creditors reserved against the surety. Judgment.

Robertson, J.

In my search for authorities I have not been able to find one in which the facts and circumstances are exactly the same as in this case. The nearest to it is where the surety in the first instance gave the mortgage, to secure the debt of the principal debtor. I think the same principle governs here, the moment the defendant Margaret Jane Adelaide Kenney, became the owner of the land subject to the mortgage. So that at that moment she "at the instance, and with the advice and co-operation of the plaintiff," became in respect of the land, a surety for the due payment at maturity of each of these promissory notes. If I am right in this, the difficulties presented by the decision in *The Bank of Upper Canada v. Thomas* are not present, and the other cases *Pooley v. Harradine*, *Davies v. Stainbank*, with a host of others referred to in these two cases, as well as the American cases, noted by me, make it clear that by the dealings and transactions in regard to these several notes between the creditor and the principal debtor, after each of them became due and payable, the surety has become discharged and released from her liability in respect of them. I am, therefore, of opinion that the second contention of the defendant (Margaret Jane Adelaide Kenney) must prevail.

As to the third contention, it is only necessary to refer to this same case in the Court of Appeal, 16 A. R. 522, where it was unanimously held that the mortgagee (the plaintiff) cannot charge against the land under his mortgage any advances made after notice of the conveyance of the land to the defendant, Margaret Jane Adelaide Kenney, of 1st September, 1884. But the plaintiff in answer says: In another action of this defendant Ferguson against these defendants the Kenneys, in which Tait, Burch & Co., judgment creditors of John Henry Kenney, had been made parties plaintiffs, the Court of Appeal (16 A. R. 276), declared that as against creditors this conveyance was fraudulent and void, and that although

Judgment. the Court dismissed the action as regards Ferguson, Robertson, J. the assignee, on the ground that he, as assignee, of James Henry Kenney, looking at the date of the deed and the date of the assignment, the deed having been made before the Act respecting assignments, &c., by insolvent persons (R. S. O. ch. 124) came in force, it was manifest that the transaction was one which could not have been attacked by the assignee; they, however, dismissed the appeal against the creditors Tait, Burch & Co., holding that the creditors are entitled to avoid the deed under the statute of Elizabeth; and that inasmuch as the plaintiffs' firm D. McCall & Co. are creditors of the grantor, they now contend that they have the same right as other creditors to take advantage of this judgment of the Court of Appeal; and they, as ordinary creditors, have proved this claim before the Referee, so that if their security under the mortgage is gone, they still have the right to claim *pro rata* with other creditors, the proceeds of the sale of the land when made by the assignee.

Apart from the objection also taken by the defendant Margaret Jane Adelaide Kenney, as to whether there was any evidence before the Referee in this action, to establish the alleged fact, that the deed of 21st September, 1884, was fraudulent and void as against creditors, and which I will deal with hereafter, I am of opinion that the plaintiffs' firm cannot, as simple creditors, claim against the lands in that deed described. I cannot see how they can be in a better position as simple creditors, than they were as mortgagees; in fact it was as simple creditors or for whatever sum was due to them, on their running account against the defendant John Henry Kenney, after the date of the deed, that the question came before the Court of Appeal; and the language of Hagarty, C. J. O., at p. 525, in that case is, "I think it impossible to hold that as against this plaintiff the deed can be held fraudulent and void, merely because he was a creditor at the time of its execution. It purports on its face to be for a consideration of \$4,000, and it was executed at the instance and

with the advice and co-operation of the plaintiff. The ^{Judgment.} mortgage to his firm is declared to be a prior security on ^{Robertson, J.} the land, and we must hold him as fully acquiescing in the perfect propriety of this deed to the wife, as based on valid legal consideration, and as in no way a fraud upon him. The deed was, and is, of course, perfectly good between the parties."

In support of my view, I may also refer to the case of *Olliver v. King*, 8 D. M. & G. 110 ; and the language of Lord Justice Turner, at pp. 120, 121, which I adopt as being most applicable to the effect of the transaction in this case. My opinion is based upon this :—I consider the true effect of this transaction to be, that the plaintiff by his conduct agreed to this alienation of the assets of James Henry Kenney, and must be considered to have consented to take satisfaction out of the property which remained. It follows, therefore, that the Referee was wrong in reporting that the sum of \$2,790.02 due to the plaintiffs' firm, *was payable out of the lands in question*, &c. See also the remarks of Osler and Maclellan, J.J.A., in *Blackley v. Kenney*, at pp. 529, 530, 16 A. R.

The appellant also urges as another ground of appeal against the report that the creditors generally of the defendant (John Henry Kenney), instead of individually proving their own claims as they might have done, have chosen to be represented by defendant Ferguson, who is the assignee for the benefit of the creditors of the defendant John Henry Kenney, and who has no *locus standi*, &c.

The appellants do not admit that if the said creditors had proved individually, their claims would take priority to the appellant Margaret Jane Adelaide Kenney. But as they have not done so, their rights must be governed by the rights of their representative in this action. And inasmuch as the said deed to the appellant Margaret Jane Adelaide Kenney remains unimpeached and unimpeachable on the evidence herein, as respects all parties, the third finding in favour of the said John Ferguson is erroneous.

Assuming for the purpose of this particular ground of

Judgment. appeal that the defendant Ferguson is entitled to claim
Robertson, J. against the lands in question herein, in respect of the creditor's claims, which he represents, still the appellant Margaret Jane Adelaide Kenney is entitled to priority at least in respect to her inchoate right to dower.

The appellant Margaret Jane Adelaide Kenney derives her title to the lands in question under the deed of September 1st, 1884. This deed was duly registered. The Court of Appeal for Ontario has decided that upon the evidence herein the said deed is good as against all the parties to this action, including the defendant John Ferguson. The judgment of the said Court of Appeal has also been registered, and has not been appealed from, and the said appellant claims the benefit of the Registry Act.

The original order of reference was made by the Master in Chambers on 18th October, 1887, to enquire and report whether there is any, and if any, what sum of money is due to the plaintiff in respect of the mortgage security in question in this action.

Under this order the referee would enquire as to subsequent incumbrances, &c., and under Con. Rule 309, trustees &c., may sue and be sued on behalf of, or as representing the property or estate of which they are trustees, &c., without joining any of the parties beneficially interested in the trust or estate, and may be considered as representing such parties in the action.

In this case, however, the assignee Ferguson did not represent the property or estate. The Court of Appeal in his action against these defendants the Kenneys, held that he had no *locus standi*, and therefore he could not be considered as representing the parties who were beneficially interested in the equity of redemption. Moreover, as I understand the report of the referee, and the evidence taken before him, the claims which Ferguson brought in, with the exception of Tait, Burch & Co., formed no charge upon the mortgaged lands, they were merely simple contract debts which had not been reduced to judgment, and therefore no execution in regard to them was placed in the

sheriff's hands, or otherwise did they become charged on the land. It follows, therefore, that in regard to all the claims mentioned in the schedule to the report as being allowed to Ferguson as assignee on behalf of the creditors of the defendant John Henry Kenney must be disallowed, First, because Ferguson as assignee had no *locus standi* ; second, because those of the creditors who were execution creditors were not made parties to this action ; third. because those who were not execution creditors had no charge or lien on the lands.

Before the Referee the only evidence to prove that the deed of 1st September, 1884, from defendant James Henry Kenney to the defendant Margaret Jane Adelaide Kenney, was fraudulent and void as against creditors, was a certified copy of the certificate of the Registrar of the Court of Appeal, as to the result of the appeal in *Ferguson v. Kenney*—there was no formal judgment nor an exemplification of one.

I would, however, allow proper evidence of that judgment to be given, if I thought such evidence could be received in this action. In order to make it admissible evidence, a judgment must be between the same parties in the suit in which it is offered as evidence : that was not the case here. The parties in the suit of *Ferguson v. Kenney*, at the time of the entry of the judgment therein, were Tait, Burch & Co. plaintiffs, against these defendants. the Kenneys. The name of the plaintiff Ferguson was, by the judgment of the Court of Appeal, struck out of the action : that left Tait, Burch & Co. plaintiffs against these defendants, the Kenneys, defendants. Tait, Burch & Co., are not parties to this action, not having been parties by original writ, nor added afterwards by the Referee. In my opinion, therefore, the judgment in *Tait, Burch & Co. v. Kenney*, could not be received in evidence in this action to shew that the conveyance of 1st September, 1884, from defendant John Henry Kenney to the defendant Margaret Jane Adelaide Kenney, was void as against creditors.

The result is, that this action, so far as the lands de-

Judgment. scribed in the mortgagees' security are concerned, has
Robertson, J. entirely failed. The plaintiff should pay the costs of the
defendant Margaret Jane Adelaide Kenney; and I allow
the appeal except as to the first ground; and I allow the
defendants, the Kenneys, the general costs of the appeal.

G. A. B.

[COMMON PLEAS DIVISION.]

HUFFMAN V. WALTERHOUSE AND BRODDY.

*Innkeeper—Sale of stallion under R. S. O., ch. 154, for keep, etc.—Lien—
Revival of—Tavern License—Owner of.*

An innkeeper, claiming to act under R. S. O., chap. 154, sold by public
auction a stallion belonging to the plaintiff, a boarder at his inn, to en-
force a lien thereon for the keep and accommodation thereof.

Held, that the lien existed and the sale was authorized.

After the lien accrued the plaintiff removed the stallion and subsequently
brought it back to the inn.

Held, that the lien revived on the return of the stallion.

Under sec. 12 of R. S. O. ch. 194, the person receiving a tavern license
is assumed to have satisfied the license commissioners that he is the
true owner, but, notwithstanding, it can be shewn that the licensee was
merely the agent of another who was the real owner of the business.

Statement. THIS was an action tried before FALCONBRIDGE, J., and a
jury, at Toronto, at the Fall Assizes of 1889.

The action was brought by the plaintiff against the
defendant Walterhouse, an inn-keeper at Cookstown, and
the defendant Broddy, an auctioneer, to recover damages
for the alleged wrongful sale of a stallion.

The stallion was sold by the defendant Broddy under
instructions received from the defendant Walterhouse, who
claimed to enforce a lien for the keep and accommodation
of the stallion.

The plaintiff, who was the owner of the stallion, had
stayed for some time at the defendant Walterhouse's inn,
travelling at intervals with the stallion during the season,
going out during the week and returning on Saturday, the
stallion being stabled at the inn. At the end of the season

of 1888 the plaintiff stayed on at the house until midwin-^{Statement.}ter, when the defendant Walterhouse advertised the plaintiff's goods and the stallion for sale under a claim for plaintiff's board and the keep of the stallion. After various postponements the sale took place.

At the close of the case the learned Judge submitted several questions to the jury—who found first, that there was an agreement on the part of the plaintiff to pay for a period extending from the fall of 1886 till the spring of 1887, the sum of \$18 per month, and that on or about April, 1888, a balance of account was struck, shewing a balance in favour of the defendant Walterhouse of \$65; that on the 29th January, 1889, there was a balance struck between the plaintiff and the said defendant, shewing a balance of \$295.50 in favour of the said defendant.

The jury also found that after the close of the season of 1888, the said defendant should be allowed at the rate of \$18 a month for the keep of plaintiff and his horse, and that the plaintiff was not entitled to charge the said defendant anything for his work and labour. They found that the said defendant should be allowed fifty cents per day for the keep of the stallion from the date of the seizure until the day of the sale; that the goods and chattels realized their full value at the sale; and that the plaintiff had sustained no damage from the seizure of the goods, or from the mode in which the sale was conducted.

The last question was, as to whether there was an agreement that the said defendant should have a lien. The jury did not answer this question.

The learned Judge upon the above answers entered judgment for defendants, dismissing the action.

A motion was made by the plaintiff to set aside the findings and judgment entered for the defendants and to enter judgment for the plaintiff.

In Michaelmas Sittings, 1889, *D. O. Cameron* and *Blain* supported the motion.

McFadden shewed cause for the defendant Walterhouse, and *Graham* for the defendant Broddy.

Judgment.

Galt, C. J.

The authorities are sufficiently referred to in the judgment.

March 7, 1890. GALT, C. J.:—

[The learned Chief Justice, after fully commenting on the evidence, decided that the findings of the jury were in accordance therewith. He then proceeded]:

The legal rights of the parties are based on the construction to be placed on ch. 154, R. S. O., and on the position of the parties. The learned counsel on both sides referred to very numerous cases but it is unnecessary to comment on many of them.

By section 2 of ch. 154, every inn-keeper, boarding-house keeper, and lodging-house keeper shall have a lien on the baggage and property of his guest, boarder, or lodger for the value of any food or accommodation furnished to such guest, &c., with a power of sale.

By the common law an hotel keeper had such a lien, but a boarding-house keeper and lodging-house keeper had not. The statute extends the same privilege to all, so that it is a matter of indifference whether the plaintiff was in the house of the defendant as a guest or a boarder. In my opinion he was there as a boarder, and not as a guest. The statute also confers a power of sale.

By section 3 of same statute. Where an inn-keeper, boarding-house keeper, lodging-house keeper, or livery stable keeper has by law a lien upon a horse or other animal for the price of any food &c., he shall, in addition to all other remedies provided by law, have the right in case any part of such price or value remains unpaid for the space of two weeks, to sell by public auction such horse, &c.

The first question raised by Mr. Cameron, counsel for the plaintiff, was, that as the 3rd section applies only to cases in which the hotel or boarding-house keeper has by law a lien, it has no application to the present case because the second section does not include a horse.

By the common law an hotel keeper had a lien on horses the property of his guest or brought to his inn by a guest, see *Allen v. Smith* 12 C. B. N. S. 638, and *Mulliner v. Florence*, 3 Q. B. D. 484, consequently the lien on the horse did exist, and the power of sale in the third section applies. His argument was, that because the terms of the second section were "for the value or price of any food or accommodation furnished to such guest, boarder, or lodger," it must be held to apply only to the person of the guest or boarder; but it has been held, as shown in the cases to which I have referred, that horses and carriages are subject to a lien for goods furnished not only for the person of the guest but also for the food of his horses and servants. It was manifestly the intention of the Legislature to increase not to diminish the rights of a landlord. The Legislature by declaring that the landlord shall have a lien adds nothing to his common law right. What it has done is to confer a power of sale which he did not previously possess.

Judgment.

Galt, C. J.

He then contended that because the wife carried on the business when the settlement of the \$65 was made no lien existed for that. There has been no finding in accordance with this as I have already stated; all that appeared in the evidence was, that the license was in the name of the wife; the plaintiff, moreover, was not in the house as a guest but as a boarder, and under the statute the boarding-house keeper has the same right as an inn-keeper.

Mr. Cameron also contended that as the horse and goods had been removed after this settlement was made, no lien could be claimed against them on the plaintiff bringing them back after the close of the season in 1888.

In *Mulliner v. Florence*, 3 Q. B. D. 484, to which I have referred, the guest arrived at the end of September, 1876, and remained until the middle of January, 1877. In November, 1876, after he had contracted a portion of the debt, a pair of horses, waggonette, and harness, came to defendant's inn for the guest; after

Judgment. the guest (who was a swindler, and really had no
Galt, C.J. property in the horses,) left, the landlord claimed a lien not only for the debt contracted after the horses arrived, but for that which was due before.

Lord Bramwell in giving judgment says, at p. 488 : "The first question for our decision is, what was the inn-keeper's lien ; was it a lien on the horses for the charges in respect of the horses, and on the carriage, in respect of the charges on the carriage and no lien on them for the guest's reasonable expenses, or was it a general lien on the horses and carriage and guest's goods conjointly, for the whole amount of defendant's claim as inn-keeper ? I am of opinion that the latter was the true view as to his lien, and for this reason that the debt in respect of which the lien was claimed was one debt, although that debt was made up of several items."

In the present case the defendant had a right of lien on the goods when they were removed in April, 1888, and I can see no reason for holding that when the plaintiff returned, bringing the goods with him, the right of lien did not revive.

Mr. Cameron then contended that as the defendant claimed a lien for a larger amount than he was entitled to his right of lien ceased. The jury have found that as respects the amount of the defendant's claim it is correct, consequently it is unnecessary to consider the question of lien raised on the basis that the claim was excessive.

Mr. Blain's contention was that the statute only confers the right to sell the goods. This has reference to the \$65 to which I have chiefly referred. He then very forcibly urged that as respects the remainder of the claim, it was covered by the agreement that no charge was to be made, but that the plaintiff's services were to be accepted as an equivalent. The jury have found expressly that there was no such agreement, and in my opinion such finding is in accordance with the evidence.

Under sec. 12 of the Liquor License Act, R. S. O. ch 194, the person receiving a tavern license is assumed to have

satisfied the commissioners that he or she is the true owner of the business. But notwithstanding the issue of a license to one person, it is competent to shew that the licensee was merely the agent of another who was the real owner of the business.

Judgment.

Galt, C.J.

MACMAHON, J., concurred.

[COMMON PLEAS DIVISION.]

BADGEROW V. THE GRAND TRUNK RAILWAY COMPANY.

Railways—Accident—Negligence—Evidence of — Defective brake—Latent defect—Conjecture.

Action by plaintiff to recover damages for the death of her husband by reason of, as was alleged, a defective brake on a car on defendant's railway on which deceased was employed as a brakeman :—

Held that there could be no recovery, for the evidence failed to shew how the accident happened, the contention that it was the defective brake being mere conjecture; and, even had it been the cause, it would have been no ground of liability, for under the defendant's rules it was the deceased's duty to examine and see that the brakes were in proper working order and report any defect to the conductor; and if he made the examination he apparently discovered no defect as he made no report, a latent defect being no evidence of negligence; and if he omitted to make such examination, etc., then the accident would be attributable to his own negligence.

THIS was an action tried before FALCONBRIDGE, J., and Statement, a jury, at Toronto, at the Autumn Assizes of 1889.

The action was brought by Jennie Badgerow, administratrix of David L. Badgerow, deceased, on behalf of herself and Archie Badgerow, her infant child, under Lord Campbell's Act, to recover damages from the defendants for the death of her husband, the said David L. Badgerow, by the alleged negligence of the defendants.

The action was also framed under the Workmen's Compensation for Injuries Act, alleging a defect in a certain brake on a car, in a train of cars on which David L. Badgerow was employed as brakeman, on the defendants' line of railway; and, by means of which defective brake,

Statement.

the death of Badgerow was alleged to have been caused; and that the defect in the said brake was a defect in the ways, works, machinery and plant of the defendants' railway, and was or should have been known to the defendants through their car inspectors at York, from which the train started with Badgerow as one of the brakemen on the day he was killed.

The facts are fully set out in the judgment of MACMAHON, J.

On the findings of the jury the learned Judge found for the defendants.

In Michaelmas Sittings, 1889, a motion was made to set aside the verdict and judgment entered for the defendants and have the same entered for the plaintiff.

In Hilary Sittings, 1890, *Macculloch* supported the motion.

Wallace Nesbitt, contra.

The arguments, so far as material, appear from the judgment.

March 7th, 1890, MACMAHON, J.:—

The train on which the deceased was employed was a freight train, and on the 5th of March, the day on which Badgerow met with the accident resulting in his death, the train reached York station about 3 o'clock p.m., and at that time Badgerow and Clarke, the two brakemen attached to that train, were at the station and remained there, departing with the train at 3.40 on its eastward trip, and about 7.15 o'clock Badgerow left the conductor's van, at a point two miles west of Uxbridge station, to apply the brakes where there is a curve and a down grade, and when the train reached the semaphore near Uxbridge station Michael McCarthy, the conductor, missed Badgerow, and on going back with the pilot engine found Badgerow's body quite dead, close to the track about three-quarters of a mile west of the semaphore at Uxbridge.

On an examination of the cars at the rear end of the train, where Badgerow was braking, it was found that some of the brakes which had been applied were not relaxed as they should have been before reaching the semaphore; and on a flat car—the third car from the van—the conductor found the brake-mast without any circle, the whole top attached to the mast being gone.

Judgment.¹
MacMahon,
J.

The manner in which the brake-circle is put on the mast is thus described by McCarthy, the conductor; “There is a hub in the centre of the spokes of the brake-circle, and the upper part of the mast is inserted into that hub, the circle lying flat on top of the mast; the spokes run to a centre, and they sit on a shoulder on the mast, and then there is a nut screwed on the top of the mast which keeps the circle flat in its place.”

Badgerow's body was taken to Goodwood station from the place where it was found; and in the van from which the body was removed there were removed two pieces of a brake-circle, which it was asserted on behalf of the plaintiff was the brake-circle attached to the brake-mast on the flat-car spoken of by McCarthy, who could not, at the trial, say whether the brake was or was not set on that particular car at the time he examined it.

McCarthy did not see any part of a brake-circle near Badgerow's body at the time it was found; and if the brake-circle belonging to the brake-mast of the flat-car spoken of by McCarthy was the one in the van from which Badgerow's body was removed at Goodwood, there is no evidence by whom or where it was picked up, and put there.

Evidence was given on behalf of the plaintiff by experts to shew that there had been a crack for at least some weeks in the brake-circle taken out of the van at Goodwood; and that the brake inspectors at York station should have discovered the defect if proper precautions had been taken by them in making their examination; and that in such examination they should have used a hammer to tap the

Judgment. brake-circle in order to make a proper test for discovery
MacMahon, of defects therein.
J.

The rules of the defendants produced from the plaintiff's custody, and which she stated belonged to her late husband, and for which he gave a receipt to the Grand Trunk Railway Company, provide :

Rule 196, "The conductor and brakemen have time on the journey to examine the wheels, brakes, coupling and journals of the cars, and can have no excuse for allowing them to be neglected; it will always be presumed that they are inattentive to their duties if they are neglected."

By Rule 217, conductors and brakemen of freight trains must be in attendance half an hour before the time fixed on the time table for the departure of their trains.

And Rule 229 prescribes in regard to brakemen they must examine the car brakes to see that they are in proper working order, and report any defect to the conductor.

The evidence is that Badgerow, who had been a brakeman for about five years, was in attendance for at least forty minutes prior to the departure of the train, and that there was ample time in which to examine the brakes.

With the careful inspection he was called upon by the rules to make so as to enable him to report to the conductor, Badgerow, if he did make one, did not, it must be assumed, discover any defects, for he did not report that there were any to the conductor; and, if he did not make an examination, he was violating one of the important rules of the railway company whose servant he was, and so was guilty of negligence from which, it might possibly be said, the accident occurred resulting in his death; if so, no liability attaches to the defendants by reason of such negligence.

I say it *might possibly* be assumed, for there is no evidence upon which the accident causing Badgerow's death can be attributed to any particular cause; nor is there any evidence shewing that the defendants have been guilty of any negligence conducing to his death.

The evidence is, that after leaving York, Badgerow

would require to use the brake on the flat-car, from which the brake-circle was missing, at Scarborough, Markham, and Stouffville, and coming down the grade at Unionville before reaching the grade where he last went out to apply the brakes. So that it is fair to assume that at these several places, the brake was not, so far as he could discern, defective, otherwise he would have communicated the defect to the conductor; and also had he found it defective at any of the prior points where he was required to use it, he would not have attempted to use it in braking the train near Uxbridge through which attempted user at that point, while in that defective condition, the plaintiff claims that his death was caused.

Judgment.
MacMahon,
J.

If this brake was, as stated, used on at least four occasions by the deceased prior to coming to the grade near Uxbridge, and as the brake-mast was found without the brake-circle and the nut which keeps the circle attached to the brake-mast, the strong probability is, that the nut had worked completely off, or was loose, and when Badgerow went to apply the brake the nut and brake-circle flew off together, and so precipitated him from the train. For, even if the brake-circle had been cracked so as to have broken through the strength employed by Badgerow in applying the brake, the brake-circle would have parted from the mast, but would have left the nut there if screwed down to its proper place over the brake-circle.

However, there is no evidence to shew how, or in what manner, or from what cause, the accident causing the death happened. At best there is mere conjecture, and any negligence with which the defendants have been charged by reason of what is stated was a defect in the brake-circle, cannot be charged against the railway company, because it was the duty of Badgerow, under the rules, to have made such an examination as would have satisfied him that there was no defect in the brake; and, if that was not done, the defendants cannot be made liable.

In *Hanson v. Lancashire and Yorkshire R. W. Co.*, 20 W. R. 297, where by reason of the breaking of a chain

Judgment. securing timber on a truck on the defendants' line of railway, and the plaintiff, who was on a passenger train passing the timber truck on another track, was injured by the projecting timber, there was evidence that the breakage was caused by a latent flaw in the chain. Brett, J., at p. 298, said: "The accident here might solely be caused by the latent defect in the chain, and that would not be negligence on the defendants' part."

MacMahon,
J.

And in *Gilbert v. North London R. W. Co.*, 1 Cab. and El. 33, Field, J., said: "If in such cases as these" (actions for injuries caused by negligence) "the facts proved are as consistent with the supposition that due and reasonable care has been exercised as that there has been negligence the plaintiff must fail." See also the note to that case at the foot of same page.

I have not considered it necessary to discuss the other questions raised by the plaintiff's motion as upon the main question as to the duty of the deceased to inspect the brake—if the accident could be attributed to any defect therein—we hold that it was incumbent upon Badgerow, according to the rules, to make such inspection, and his neglect so to do disentitles the plaintiff to recover.

The judgment entered by the learned trial Judge for the defendants will stand, and the plaintiff's motion will be dismissed with costs.

GALT, C. J., and ROSE, J., concurred.

[COMMON PLEAS DIVISION.]

REGINA V. CANTILLON.

Liquor License Act, R. S. O. ch. 194—Adjudication—Conviction—Imprisonment without prior distress—Costs of conveying to jail.

The adjudication on a second offence under the "Liquor License Act," without providing for distress, directed immediate imprisonment in default of the payment of the fine and costs; and the conviction drawn up under it was in similar terms. After the issue of a writ of *certiorari*, but before its return, an amended conviction was returned providing for distress being first made :—

Held, that the adjudication and conviction made under it were void for not providing for distress; and that the amended conviction could not be supported, because it did not follow the adjudication.

Semble, that had the amended conviction been in other respects good it would not have been void under the Liquor License Act for including the costs of conveying to jail.

IN Michaelmas Sittings, 1889, an order *nisi* was obtained Statement.
to quash a conviction of the defendant, made by James Grace, acting police magistrate for the city of Brantford, and Wm. Likens, a justice of the peace, for a second offence in selling liquor during hours prohibited by the "Liquor Licence Act."

In Hilary Sittings, 1890, *DuVernet* supported the motion.
Langton, Q. C., contra.

March 8, 1890. MACMAHON, J. :—

The order *nisi* states no less than seventeen grounds for quashing the conviction, most of them being untenable.

There are two grounds taken which we think are fatal to the conviction, viz. :

1. That the original conviction wrongfully awards direct imprisonment in default of payment of the fine ; and

2. That the conviction secondly returned to the clerk of the peace does not conform to the adjudication, in this that the conviction provides for levying the fine and costs by distress while the adjudication omits to provide for distress.

Judgment.

MacMahon,
J.

The adjudication signed by the justices is as follows:
“We therefore adjudicate the defendant W. D. Cantillon for his said offence to pay a fine of \$75, and costs \$2.85, and, in default of payment forthwith, to be imprisoned in the common gaol in the County of Brant for the space of 20 days.”

The conviction first returned, after stating the amount of the fine and costs adjudged to be paid, provided that if the said several sums were not paid forthwith the defendant was to be imprisoned for 20 days unless the said several sums were sooner paid.

After the issue of the *certiorari*, but before its return, the convicting magistrates filed an amended conviction which provided that on non-payment forthwith of the fine and costs then the same was to be levied by distress, and in default of sufficient distress imprisonment of the defendant for 20 days “unless the said sums and the costs and charges of conveying the said Wm. D. Cantillon to the said gaol be sooner paid.”

The 71st section of the Liquor License Act, R. S. O. ch 194 makes no provision for the levying of the penalty imposed for a second offence. And where there is no mode of raising the penalty by the Act authorizing the conviction then the justice is empowered by R. S. C. ch. 178, section 62 (Summary Convictions Act) to issue his warrant of distress (forms N. 1 and N. 2), which shew that it is only in default of distress that the defendant is to be imprisoned.

The adjudication made does not award distress, and the conviction first filed follows the adjudication in awarding direct imprisonment for non-payment of the fine and costs and is therefore bad. And the second conviction is bad because it awards distress, and in that it does not follow the adjudication, and is bad for that reason. See *Regina v. Brady*, 12 O. R. 358, at pp. 360-1 ; *Regina v. Higgins*, 18 O. R. 148.

Had the adjudication been proper there is ground for Mr. Langton's contention that the conviction secondly filed

would not have been bad by reason of its including the costs and charges of conveying the defendant to goal. See Forms N. 1 and N. 2 to Summary Convictions Act.

The conviction must be quashed without costs.

There will be the usual protection to the magistrates and officers.

GALT, C. J., concurred.

ROSE, J., was not present at the argument and took no part in the judgment.

[COMMON PLEAS DIVISION].

REGINA V. ROWLIN.

Conviction—Imposition of costs of commitment and conveying to jail—Offence against Public Health Act, R. S. O. ch. 205.

A conviction for carrying on a noxious and offensive trade contrary to R. S. O. ch. 205, the Public Health Act, imposed in default of sufficient distress to satisfy the fine and costs imprisonment in the common jail for fourteen days, unless the fine and costs, including the costs of commitment and conveying to jail were sooner paid.

Held, following *Regina v. Wright*, 14 O. R. 668, that the imposition of the costs of commitment and conveying to jail was unauthorized, and that sec. 1 of R. S. O. ch. 74, not referred to in that case, did not affect the question.

In Michaelmas Sittings 1889, an order *nisi* was obtained to quash a conviction made by James Cahill, police magistrate for the city of Hamilton, and justice of the peace for the county of Wentworth.

The conviction was made on the 23rd June, 1889, on the information of one of the sanitary inspectors of the township of Barton local Board of Health, laid on the 6th of June, 1889, and averred that Frank Rowlin "did unlawfully, and after the passing of 47 Vic. ch. 38 (1884), now ch. 205 of the Revised Statutes of Ontario (1887), at lot number ten in the first concession of the township of Barton, in the county of Wentworth, without the consent of the municipal council of the said township of Barton,

Statement. establish and carry on the trade, business, or manufacture of artificial manure from carcases, also being a noxious and offensive trade, manufacture, or business contrary to the said statute in such cases made and provided ;” and imposed a fine of \$200, payable forthwith to the treasurer of Barton for the use of the local Board of Health, and \$12 costs payable to the complainant, one of the sanitary inspectors of said Board ; and in default of payment forthwith of said fine and costs, the same were to be levied by distress, &c., and in default of sufficient distress, imprisonment in the common jail for the said county of Wentworth, at the said city of Hamilton, for the term of fourteen days, unless the said several sums and all costs and charges of the said distress (and the commitment and conveyance of the said Frank Rowlin to the common jail,) were sooner paid.

The magistrate found as a matter of fact that the said Frank Rowlin had established and carried on the trade, business and manufacture complained of, and which constituted the offence mentioned in said conviction, prior to the coming into force of the Act 47 Vic. ch. 38, (O.)

In Hilary Sittings, 1890, *Bicknell* supported the motion. *Aylesworth* and *Waddell*, contra.

March 8, 1890. · ROSE, J.:—

Mr. Aylesworth candidly admitted that, unless he could distinguish *Regina v. Wright*, 14 O. R. 668, the objection as to the conviction including the costs of commitment and conveying to jail must prevail.

The argument was that sec. 1 of R. S. O. ch. 74, which was not referred to in *Regina v. Wright*, gave the power to collect such costs. That section provides that “ where a penalty or punishment is imposed under the authority of any statute of the Province of Ontario * * the like proceedings, and no other, shall and may be had for recovering the penalty * * and the infliction of the punish-

ment, and otherwise in respect thereof * * as under the statutes of the Dominion of Canada then in force might be had * * if the penalty or punishment had been imposed by a statute of Canada, unless in any Act hereafter passed imposing the penalty or punishment, it is otherwise declared." And that this section introduced the provisions of sec. 66, discussed in *Regina v. Wright*.

Judgment.

Rose, J.

It seems to me that this argument cannot prevail. It can go no farther than place the provisions of secs. 63 and 107 of ch. 205, on the same footing as if the Act containing them had been a Dominion Act, *i. e.*, as if the penalty imposed by sec. 63 had been imposed by a Dominion Act. If ch. 205 had been a Dominion Act, then sec. 66 of ch. 178 would not have applied, for the reasons pointed out in *Regina v. Wright*, viz., that ch. 205, by sec. 107, provides a mode for levying the penalty.

It would be anomalous to be required to read into an Ontario Act the provisions of ch. 178 of the Dominion statutes, when the same provisions would not be read into a Dominion Act passed in similar terms.

I have read over the evidence referred to with reference to the date when the business was established ; and I am clearly of the opinion that there was evidence upon which the magistrate was warranted in finding that the business of blood and bone boiling was established since 1884. I have not to consider whether the finding is the proper conclusion to be drawn from conflicting evidence.

While the conviction must be quashed, in my opinion it must be without costs and with the usual order for protection.

GALT, C. J., and MACMAHON, J., concurred.

[COMMON PLEAS DIVISION.]

GARDNER V. BROWN.

Dower—Equity of redemption.

There can be no dower in land of which the husband had merely acquired the equity of redemption, and which he had parted with.
Re Croskery, 16 O. R. 207, followed.

Statement.

THIS was an appeal from the ruling of the Registrar of the Queen's Bench Division on a question of title, namely : that the land in question here was subject to the inchoate right of dower of the wife of William Burgess, Jr. The facts appear from the judgment.

February 4, 1890, *Arnoldi*, Q.C., supported the motion.
R. M. Macdonald, contra.

February 23, 1890. MACMAHON, J.:—

William Burgess, Sr., having encumbered the lands—referred to in the admissions for argument on question of title—by three several mortgages, conveyed to his son William Burgess, Jr., subject to the incumbrances so created.

After the conveyance to William Burgess, Jr., he mortgaged the lands to Robert Blong for the sum of \$7,000, his wife joining in the mortgage for the purpose of barring her dower.

William Burgess, Jr., afterwards assigned all his estate, real and personal, to the plaintiff, for the benefit of his creditors, under R. S. O. ch. 124.

The question is: Whether the land mentioned and sold by the plaintiff, under the assignment to him, and purchased by the defendant, is subject to the inchoate right of dower of the wife of William Burgess, Jr. ?

The learned Registrar of the Queen's Bench Division held

that the purchase by the defendant was subject to such right.

Judgment.

MacMahon,
J.

What William Burgess, Sr., had to convey, and what he did convey to William Burgess, Jr., was his equity of redemption in the lands, and the wife of the latter would only be entitled to dower out of this equitable estate in the event of her husband dying beneficially entitled, which it is impossible he can now do, having parted with his equitable estate and interest to the plaintiff: R. S. O. ch. 133, sec. 1 ; *Re Croskery*. 16 O. R. 207.

The appeal must be allowed, with costs.

[COMMON PLEAS DIVISION.]

GIRVIN V. BURKE.

Bills of exchange and promissory notes—Notes given for purchase of patent—Endorsement of words “given for a patent right”—Necessity for as between maker and payee—Waiver—R. S. C. ch. 123, secs. 12-14.

The statute R. S. C. ch. 123, secs. 12-14, which requires notes given for the purchase of a patent right, before being issued to have the words “given for a patent right,” written or printed thereon, provides that the endorsee or transferee of a note with such words thereon shall have the same defence as would have existed between the original parties, and subjects to indictment, anyone issuing, selling or transferring such notes without such words written thereon.

One of the plaintiffs gave two notes to the defendant for the purchase money on the assignment of a patent right on which the required words were written. These notes were subsequently cancelled, and in lieu thereof the notes in question were given, made by both plaintiffs without having the said words thereon:—

Held, that the notes were enforceable by defendant, these words not being required as between maker and payee, and, even if they were, the makers had the right to and did waive having the same thereon.

Statement.

THIS was an action tried before ROSE, J., without a jury, at Goderich, at the Autumn Assizes of 1889.

There were two actions of *Girvin v. Burke*, and *Burke v. Girvin and Spence*, which were consolidated. The actions arose out of the sale and assignment by Burke to Girvin, of a patent.

For the patent so sold and assigned, Girvin first gave his own notes, having the words “Given for a patent right,” printed across the face thereof; and for these the notes of Girvin and Spence were substituted; and it was in respect of the latter that the defendant Burke counter-claimed. In answer to the counter-claim it was set up that the last-mentioned notes were void, being granted for a patent right without the words “given for a patent right,” required by the Act R. S. C., ch. 123, sec. 12, being written or printed across their face.

In the statement of claim, fraud was set up on the sale and assignment of the patent.

The learned Judge found for the defendant on the question of fraud, but reserved his decision on the other

question; and subsequently delivered the following judgment : Judgment.
Rose, J.

October 24, 1889. ROSE, J.:—

At the trial I gave judgment for the defendant on the charge of fraud, but reserved judgment as to his right to recover on the notes upon his counter-claim.

The question arose under secs. 12, 13, and 14 of R. S. C. ch. 123.

Sec. 12 provides that "Every bill of exchange, or promissory note, the consideration of which consists in whole or in part, of the purchase money of a patent right, or of a partial interest, limited geographically or otherwise, in a patent right, shall have written or printed prominently and legibly across the face thereof, before the same is issued, the words 'given for a patent right.'"

The notes in question were made by the plaintiffs Girvin and Spence, and were for a patent right, and had not the required words written or printed across the face.

The defendant who counter-claims to recover the amount of the notes is the payee and holder. To his counter-claim the answer is made that the notes are void.

They are not so declared by the Act in express terms. Are they void by implication?

Sec. 13 provides, "The indorsee or other transferee of any such instrument having the words aforesaid so printed or written thereon, shall take the same subject to any defence or set off in respect of the whole or any part thereof which would have existed between the original parties."

This clause shews the object of the Legislature to be to protect the maker, and to make the endorsee or other transferee of any such note a holder with notice, *i.e.*, to put the endorsee or transferee in the position of the payee as to any defence which the maker may have against a claim by the payee.

It is clear, therefore, that these words are not necessary as between the maker and payee.

Judgment.

Rose, J.

Sec. 14 makes "every one who issues, sells or transfers by endorsement or delivery, any such instrument," not having the prescribed words thereon, guilty of a misdemeanor, and liable on conviction to fine and imprisonment.

This section clearly does not apply to either the maker or to the payee while he is the holder.

I think, therefore, as between the maker and the payee, the contract or note is not invalidated so as to give the maker any defence other than he would have had without the statute.

It seems to me that the statute was not passed to give any new defence against the payee, but merely to preserve as against an endorsee or transferee any defence existing against the payee, and this may well be accomplished without holding that the effect is to invalidate the note.

The cases are collected, and the law summarized in the 2nd ed. of Maxwell on Statutes, p. 487, *et seq.*

Mr. Justice Blackburn, in *Waugh v. Morris*, cited by Mr. Garrow, and which is reported in the L. R. 8 Q. B. 202, at p. 208, says: "We quite agree, that where a contract is to do a thing which cannot be performed without a violation of the law, it is void, whether the parties knew the law or not. But we think, that in order to avoid a contract which can be legally performed on the ground that there was an intention to perform it in an illegal manner, it is necessary to shew that there was the wicked intention to break the law; and, if this be so, the knowledge of what the law is becomes of great importance. * * And it seems to us that the *mens rea* is as necessary to avoid a contract, which can be legally performed, because when it was made it was with the object of satisfying an illegal purpose, as it is to render the parties criminally liable."

So far as the case is applicable, it does not assist the plaintiff, for here both makers and payee knew that they were contracting with regard to a patent right, and no words on the note would have given more perfect notice, and there could be no "wicked intention" as between themselves in not having the words written or printed on the face of the notes.

Then again, I think, so far as Girvin is concerned, he waived any benefit, if any he had under the statute, by giving the new notes under the written agreement of the 26th of November, and cancelling the notes on the 8th of November, the first notes having the prescribed words printed across their face.

It seems clear that such a benefit may be waived. I refer to the 5th ed. of Broom's Legal Maxims, at p. 699, under the head "*quilibet potest renunciare juri pro se introducto*," and to the cases there referred to.

There must be judgment dismissing the plaintiff's action with costs, and for the defendant on his counter-claim against the plaintiffs for the amount of the notes, and interest since they became due, common items to be taxed only once.

Judgment.
Rose, J.

In Michaelmas Sittings 1889, a motion was made to the Divisional Court to set aside the judgment entered for the defendant and to enter judgment for the plaintiffs.

In Hilary Sittings, February 8, 1890, *Aylesworth*, Q. C., supported the motion: The notes are invalid not having the words "given for a patent right" written or printed across their face before they were issued. Sections 12, 13 and 14 of R. S. C. ch. 123, shew that unless these words are so written or printed the notes cannot be enforced. Section 12 provides that this shall be done before the notes are issued, and a note is issued when it is made and delivered. Section 13 provides that the endorsee or other transferee who takes such note with these words being written or printed across them takes it subject to any defence, etc., which would have existed between the original parties; and section 14 provides that every one issuing, selling, or transferring by endorsement or delivery any such instrument not having the prescribed words thereon is subject to indictment. Where the doing of an act renders the party liable to indictment the act itself cannot be civilly enforced: Anson on Contracts, 5th ed., 180. This Act is similar to a Pennsylvania Act except that

Argument.

the words used in the latter are "take, sell or transfer," while our act uses the words "issue," etc. The cases decided under the Pennsylvania Act shew that there is no liability: *Haskell v. Jones*, 86 Penn. 173; *Palmer v. Minar*, 15 N. Y. Sup. Ct. 342. See also *Bensley v. Bignold*, 5 B. & Ad. 335; *Little v. Poole*, 9 B. & C. 192; *Melliss v. Shirley Local Board*, 16 Q. B. D. 446, Chalmers on Bills, 4th ed. 90. *Attorney General v. Birbeck*, 12 Q. B. D. 605; *Gardner v. Walsh*, 5 E. & B. 83, 89; Pollock on Contracts, 4th ed. 253, 255. There was no waiver. The act being a misdemeanour could not be waived merely by conduct, but, even if there was a waiver as to Burke, certainly there was none as to Spence.

Mackelcan, Q. C., contra. The object of sections 12 and 13 of R. S. C. ch. 123 is to provide that the endorsee or other transferee of a note given for a patent right should take the same subject to any defence or set-off which would have existed between the original parties, and to fully secure this object section 14 was passed. It never could have been intended that the person for whose benefit and protection the Act was passed should be liable to indictment for a misdemeanour if he did not avail himself of the benefit of the Act. The principle is well established that those for whose benefit an Act is passed may waive its provisions: *Markham v. Stanford*, 14 C. B. N. S. 376; *Rumsey v. North Eastern R. W. Co.* 14 C. B. N. S. 641 653; *Graham v. Ingleby*, 1 Ex. 651. The words "every one who issues" any such instrument, cannot possibly include the person to whom the note is issued. To hold this would be equivalent to saying that the maker of a note includes the payee. The words "issues, sells or transfers by endorsement or delivery," are to be read together and must be taken to relate to any transfer by a buyer or other holder, the object being to make the note subject in the hands of the transferee to any defence which would be open between the original parties: *Graff v. Evans*, 8 Q. B. D. 373, 377; *Lamb v. Brewster*, 4 Q. B. D. 220, 224. The true construction of the statute is that the payee or

holder of the note must not issue, sell or transfer it by endorsement or delivery unless before doing so he has the said words so written or printed.

Judgment.
MacMahon,
J.

March 8, 1890. MACMAHON, J. :—

We have merely to consider the legal question raised by the rule as to the effect of the statute.

The only part of the notice of motion we were called upon to consider was that asking that the judgment on the counter-claim in favour of Burke on the notes should be set aside, and to enter judgment in favour of Girvin and Spence on the counter-claim and for a return or cancellation of the notes, upon the ground that they are invalid and of no effect because the words "given for a patent right" were not written or printed across the face of the notes before they were issued.

In the judgment of my brother Rose, he, I think, clearly interprets what was the object of the Legislature in requiring the words "given for a patent right," to be written or printed prominently and legibly across the face of such notes: viz., to give the indorsee or transferee notice and to put him "in the position of payee as to any defence which the maker may have against a claim by the payee."

The 14th section of our Act, R. S. C. ch. 123 (passed in 1884) contains a provision in terms similar to an enactment of the Legislature of the State of Pennsylvania, passed in 1872, and embodying the penal clause as to fine and imprisonment for contravening the Act.

The only appreciable difference in the two enactments is as to the persons affected by the penal clauses, and who may be indicted for a misdemeanour under either Act. In the Pennsylvania Act, the clause reads: "If any person shall take, sell or transfer any promissory note or other negotiable instrument not having the words 'given for a patent right,' written or printed, legibly and prominently on the face of such note or instrument, * * shall be deemed guilty of a misdemeanour." In our Act the 14th

Judgment. section provides that, "Every one who issues, sells or
 MacMahon, J. transfers, by indorsement or delivery, any such instru-
 ment," (bill of exchange or promissory note, (sec. 12) "not
 having the words 'given for a patent right,' printed or
 written" * * "is guilty of a misdemeanour," &c.

In Pennsylvania it is only the person who shall "take
 sell or transfer," who comes within the penal clause, while
 in Canada the person who *issues*, as well as those who sell
 or transfer, may be indicted.

"Issue means the first delivery of a bill or note complete
 in form to a person who takes it as a holder:" Chalmers,
 on Bills, 3rd ed. p. 6. See also *Attorney-General v.*
Birkbeck, 12 Q. B D. 605, at p. 610.

The notes are made by Girvin and Spence, payable to
 the defendant Burke, or bearer, so that immediately upon
 the delivery of the notes to Burke, they were "issued."
 However, the maker as between himself and the payee,
 could raise the same defences to the notes whether the
 words prescribed by the statute were omitted therefrom,
 or contained thereon. Being designed for the maker's
 protection as against transferees for value from the payee,
 the prescribed words might be omitted at the pleasure of
 the maker without making him amenable to the penal
 clauses contained in the 14th section of the Act.

Having to put the interpretation which we have, and
 which is the obvious design and effect of the sections of
 the Act referred to, the use of the word "issue," in the
 14th section, is unfortunate, as in its ordinary meaning it
 applies to the maker of a note who has delivered it to the
 payee.

The effect of the Pennsylvania statute was considered in
Haskell v. Jones, 86 Penn. 173, where Mr. Justice Shars-
 wood, in delivering the opinion of the Court, said at p. 175 :
 "By the express provision of the statute, the only effect of the
 insertion of such words" ('given for a patent right') "is that
 'such note or instrument in the hands of the purchaser or
 holder shall be subject to the same defences as if in the
 hands of the original owner or holder.' By necessary im-

plication, notes without such words inserted in them, remain on the same footing as before the Act. The sole object of the Legislature was to secure, as far as could be done consistently with the rights of innocent third persons, that notice of the consideration should be given to all who should take the paper. Nothing is better settled than that between the original parties to a note given for a patent right it is a good defence to shew that the alleged patent right is void; in other words, that it is no patent right at all, and that the consideration has therefore entirely failed.”

Judgment.
MacMahon,
J.

The motion fails and must be dismissed with costs.

GALT, C. J., and ROSE, J., concurred.

[CHANCERY DIVISION.]

CAMERON V. WALKER.

Limitation of actions—Husband and wife—Removal of disability of coverture—R. S. O., ch. 111, secs. 4, 43—Title by possession—Right of entry—Mortgagor barred, mortgagee not.

A husband and wife were married in 1841. In 1865 the wife acquired three adjoining lots of land by conveyance from a stranger. The defendant was put in possession of the lands in 1869 by the husband, and in 1870 one of the lots was conveyed by them to him. In 1881 the husband and wife mortgaged the unconveyed lots which were afterwards purchased by the plaintiff at a sale under the power of sale in the mortgage. The defendant remained in possession of all the lots until 1888. In an action of trespass :—

Held (in this affirming the judgment of ROSE, J.), that the wife's disability of coverture having been removed in 1876 by 38 Vict. c. 16, secs. 1 and 5 (R. S. O. ch. 111, secs. 4 and 43), the Statute of Limitations ran against her from that time, and that the defendant had acquired a good title by possession against her :—

Held, however, that a new right of entry accrued to the mortgagee, and that the Statute did not commence to run against him until (as the earliest possible period) the time of the execution of the mortgage, less than ten years before action, and that the plaintiff claiming under him was entitled to succeed.

Seemle, per FERGUSON, J. The plaintiff, as purchaser under the power of sale, acquired a "new title" at the time of such sale, at which time the Statute began to run against him.

The effect of the "Married Woman's Property Act, 1859," as to property not excepted thereby, is that all interference on the part of the husband during their joint lives is ended.

Statement.

THIS was an appeal from the judgment of ROSE, J., in an action of trespass brought by Alexander Cameron, against George Walker for breaking down a fence between lots 43 and 44, in the village of Portsmouth.

The plaintiff claimed title to lots 44 and 45 as a purchaser under a power of sale in a mortgage made by Jane H. Gardiner and J. C. Gardiner, her husband, dated in December, 1881.

The defendant claimed title to lots 43, 44, and 45 by possession.

The action was tried at the Assizes, held at Kingston on October 9th, 1888, before ROSE, J.

G. M. Macdonell, Q. C., for the plaintiff.

J. McIntyre, Q. C., for the defendant.

Argument.

The evidence showed that all these lots belonged to Jane H. Gardiner, she having acquired them in 1865, and that her husband, J. C. Gardiner, had put the defendant who was a son-in-law in possession in 1869; and that the defendant had inclosed all three lots within one fence, and built a house on lot 43, and had occupied all three ever since. Jane H. Gardiner gave the defendant a deed of lot 43 (in which her husband joined) on March 7th, 1870. She and her husband made a mortgage of lots 44 and 45 in 1881, and the plaintiff was the purchaser of those lots under the power of sale in the mortgage. J. C. Gardiner, the husband, died in 1884. When the plaintiff purchased, he put up a fence between lots 43 and 44, which the defendant pulled down. It also appeared that when notice of sale under the mortgage was given to Jane H. Gardiner, that the defendant went to the mortgagee's solicitor's office and offered him \$50 for lots 44 and 45.

The learned Judge gave the following judgment :

May 13, 1889. ROSE, J. :—

The plaintiff proved a paper title. The defendant relied upon a possessory title. He, the defendant, in the fall of 1868, married the daughter of James Cornelius and Jane Harriet Gardiner, and in the Spring of 1869, went into possession of lots 43, 44, and 45—45 being the land in question, enclosing the three lots by a fence. On the 7th of March, 1870, the defendant received a deed from the Gardiners of lot 43. I think the defendant has proved open and continued possession from the Spring of 1869 down to the commencement of the action.

It was argued that there was a break between Mathewson and Moore,* but this was not much pressed, and on the facts, I think there was not. The law may be found in *Harris v. Mudie*, 7 A. R. 414, and *The Trustees, &c., v. Short*, 13 App. Cas. 793.

* Two tenants of a house on the premises.—REP

Judgment.

Rose, J.

I do not think there was any abandonment of possession while the house remained unoccupied for the purpose of repairs.

It was further argued that what took place in the office of the plaintiff's solicitors, between the defendant and Mr. Mudie, estopped the defendant from setting up the claim; but even if the mortgagee had been the plaintiff, I do not think the facts proved bring the case within the principle. See *Willmott v. Barber*, 15 Ch. D. 96, at p. 105, which is very much in point. I think, moreover, the plaintiff is not in a position to avail himself of any estoppel on such facts, even if the mortgagee could. The late decisions in our own Courts are not in the plaintiff's favour.

It was also urged that, as Mr. and Mrs. Gardiner married some time prior to 1848, and the title to the property was acquired some time prior to 1868, the exact dates were not stated, but the events occurred prior to the years named, the defendant could not acquire a title by possession during the husband's life-time.

Mr. Gardiner died on the 7th of July, 1884; Mrs. Gardiner is still alive. If Mrs. Gardiner could have brought an action in her husband's life-time, then 38 Vic. ch. 16, secs. 1 and 5, (O.,) probably has given the title to the defendant: more than ten years prior to the action having elapsed, since he took possession. See same section in R. S. O. 1887, ch. 111, secs. 4 and 43, by the effect of which coverture has disappeared as a disability, varying the law which was in force prior to 38 Vic. (O.)

Having regard to the opinion I expressed at length in *Hicks v. Williams*, 15 O. R. 228, and the effect of the 38th Vic. (O.), I think I must hold that the coverture of Mrs. Gardiner did not prevent her bringing an action, and so the statute ran in the defendant's favour unless prevented by some other fact or facts.

One other fact contended for is, that the defendant became either tenant at will to Mr. Gardiner, which tenancy Mrs. Gardiner had no power to determine, or that he became tenant under an agreement to pay taxes, and having paid the taxes from time to time until the date of the bringing of the action, the case is brought within *Finch v. Gilray*, 16 O. R. 393.

Upon referring to the evidence, I find that the defendant stated that he obtained possession from both Mr. and Mrs. Gardiner. This, I am inclined to doubt, as his detailed statement to Mr. McIntyre, in his examination in chief,

shews that he was put in possession by Mr. Gardiner, and so if the question were material, I should be obliged to find.

Judgment.

Rose, J.

As to the question of taxes, I find no evidence of any agreement to pay taxes. They were paid by the defendant or his tenants, but so far as the evidence discloses without any agreement.

Having regard to the evidence of Mr. Mudie, to which I give full credence, and the admission of the defendant, that at the time he offered the \$50, he stated it to be the full value of the land—I find the fact to be that he offered to purchase the land, making then no claim. But this, under *McGregor v. LaRush*, 30 U. C. R. 299, at p. 307, will not avail if the defendant has shewn a title by possession prior to such offer. In that case, Richards, C. J., said, “The offer by defendant to purchase, referred to by Mr. Cameron, would only be evidence to go to a jury when a defendant really had no title, or pretence of title; it could never defeat a good title.”

I have considered the effect of the holding that the defendant was put into possession by Mr. Gardiner. This at most in any event constituted the defendant tenant at will, and he became at the end of the year tenant at sufferance: sec. 4, sub-sec. 7, ch. 111, R. S. O. 1887, when Mrs. Gardiner could have brought her action.

Thus with every desire to assist the plaintiff and prevent the dishonest acquisition by the defendant of this property, to which it is clear to my mind, it was never intended that he should become entitled, as is evidenced by the deed to him of one lot only, and the subsequent mortgage by Mr. and Mrs. Gardiner, I am unable to rest a finding for the plaintiff against the defendant's contention of a prescriptive title on any solid ground.

I am unable to apply Mr. Macdonell's argument as to the necessity for corroboration of the defendant's evidence as to the mode of taking possession, as I have accepted his statement as to that, to found upon it an argument against him so far as it would apply, *i. e.*, that a tenancy at will was established.

There must be judgment for the defendant, dismissing the action with costs.

From this judgment the plaintiff appealed to the Divisional Court, and the appeal was argued on June 18th and 19th, 1889, before BOYD, C., and FERGUSON, J.

Argument.

G. M. Macdonell, Q.C., for the plaintiff. The question is: Has defendant acquired title by possession? Was the title barred prior to the date of the mortgage? The party who put him in possession is dead, and there was not sufficient corroborative testimony under R. S. O., ch. 61, sec. 10. The plaintiff is an assignee of a deceased person. Gardiner died in 1884. [*McIntyre*, Q.C.—But Mrs. Gardiner is alive, and it was her land.] [BOYD, C.—The husband was simply tenant by the curtesy initiate when he died. He could not grant for his life. You are not therefore the assignee of a deceased person. You are not seeking to recover on the strength of his estate, but of his wife who is alive.] We got an estate from him which lasted until his death in 1884. The defendant must prove the husband had no title in 1881, when the mortgage was made; that it was gone by virtue of the possession from 1869 to 1881. The ten years limit was introduced by 38 Vic. ch. 16 (O.) to take effect July 1, 1876. This case is governed by the old law. The husband had complete control: *Edwards & Hamilton*, Law of Husband and Wife, p. 91; *Jumpson v. Pitchers*, 13 Sim. 328; *Furness v. Mitchell*, 3 A.R. at p. 512. Sub-sec. 7 of sec. 5 R.S.O., ch. 111, shews when time commences to run in the case of a tenant at will. There was a new tenancy here, commencing with the deed of March 5, 1870: *Re Defoe*, 2 O. R. 623. The case is governed by sub-sec. 11, sec. 5, R. S. O. ch. 111. The wife had no independent rights until her husband's death. The defendant is estopped: *Re Allison*, 11 Ch. D. at p. 290. See also *Wood v. Seely*, 32 N. Y. 105; Bigelow on Estoppel 3rd ed. 517; *Niven v. Belknap*, 2 Johns (N. Y.) 572; Herman on Estoppel 1064; *Favill v. Roberts*, 50 N. Y. 222.

J. McIntyre, Q.C., for the defendant. There was a discontinuance of possession in 1869, when defendant was put in possession, and he now has a title by possession: R. S. O., ch. 111, sec. 5, sub-sec. 1; *Doe Perry v. Henderson* 3 U. C. R. 486; *Keffer v. Keffer*, 27 C. P. 257; *The Western Canada Loan Co. v. Garrison*, 16 O. R. 81.

Coverture is no disability against the wife: *Hicks v. Argument. Williams*, 15 O. R. 228; *Jumpson v. Pitchers*, was a case where husband and wife had joined in a conveyance which was not binding on the wife. See also *Farquharson v. Morrow*, 12 C. P. 311; 1 Sugden on Vendors and Purchasers, 8th Am. ed. 389. I also refer to *Willmott v. Barber*, 15 Ch. D. at p. 101; *McGregor v. La Rush*, 30 U. C. R. 299.

Macdonell, Q. C., in reply.

The case was further argued* before the same Judges sitting in Divisional Court on February 20th, 1890.

G. M. Macdonell, Q. C., for the plaintiff. The giving of the mortgage to a stranger in December, 1881, by Gardiner and his wife, was an interruption of the time. The time runs from the default on the mortgage, and every payment is an admission of title and makes a new starting point. The sale of the land operated as a payment. I refer to R. S. O. ch. 111, sec. 22; *Doe d. Palmer v. Eyre*, 17 Q. B. 366; *Doe d. Jones v. Williams*, 5 A. & E., at p. 297; Greenwood's Real Property Statutes, 2nd ed., p. 16; *Doe d. Baddeley v. Massey*, 17 Q. B. 373; Dart on Vendors and Purchasers, 6th ed., 436; *Hooker v. Morrison*, 28 Gr. 369; *Brockelhurst v. Jessop*, 7 Sim. 438; *Chinnery v. Evans*, 10 Jur. N. S. 855; 11 H. L. C. 115.

J. McIntyre, Q. C., for the defendant. If sec. 22, R. S. O. ch. 111, was not passed, then sec. 4 must govern. Defendant was in possession from 1869 to 1888. Section 22 does not refer to an acknowledgment of title, but to a payment. The letter of the Act must govern and if no payment was made the time runs: Leith's Blackstone, 2 ed., 445, and case there cited; *Ford v. Ager*, 2 New R. 366. In *Hooker v. Morrison*, 28 Gr. 369, and *Chamberlain v. Clark*, 28 Gr. 454, there were payments made.

*Judgment was given on the argument above, when application was made and leave granted to argue the further point as to the effect of the giving of the mortgage at this Divisional Court, and the judgments were recalled.—REP.

Argument. There was no payment here. The giving of the mortgage is not sufficient.

Macdonell, Q. C., in reply.

March 8, 1890. BOYD, C. :—

In *Jones v. Davies*, 5 H. & N., at p. 779, the question was passed upon, as to the nature of the husband's estate in his wife's lands by the curtesy after issue born and before the wife's death. Pollock, C. B., refers to Coke as saying that four things do belong to an estate of tenancy by the curtesy—namely, marriage, seisin of the wife, issue, and death of wife. And, again, he says: "That albeit the state (of tenant by the curtesy) be not consummate until the death of the wife; yet it has such a beginning after issue had in the life of the wife, that it is respected in law for certain purposes." And he calls this estate a tenancy by the curtesy 'initiate,' and not 'consummate.' He also mentions the purposes for which such estate is considered in law to exist during the life of the wife; such as doing homage to the 'lord and avowry.' The Chief Baron then proceeds thus: "According to this high authority then, it would seem that until the wife's death, when the estate would be consummate, the husband would only be the tenant by the curtesy for certain limited purposes. * * We see no reason * * for holding that the husband, during the wife's life, is tenant by the curtesy for any further purposes than those which he enumerates." With this conclusion the Exchequer Chamber agreed: Wightman, J., saying: "It is only upon the death of the wife that the husband becomes tenant by the curtesy in the proper sense of the term. * * During the life of the wife he is only what is called tenant by the curtesy initiate, and, as such, is respected in law for some purposes, * * but he is not tenant by the curtesy 'consummate,' so as to give him a separate and independent estate of freehold until the death of the wife." *S. C.*, 7 H. & N. 508, 509.

The property now in question was acquired by the wife

from a stranger to the marriage in 1865. That marriage was in 1840, and the husband gave the defendant possession of the land in 1869, and in 1884, predeceased his wife.

To this state of facts applies the second section of the statute of 1859, relating to married women; (22 Vic. ch. 34). By virtue of that section, the wife had secured to her this land, free from the control or disposition of the husband in as full and ample a manner as if she were sole and unmarried; any law, usage, or custom to the contrary notwithstanding. Standing alone, the effect of this might be to sweep away all rights appertaining to the husband as tenant by the curtesy, whether consummate or initiate.

By the 4th section, there is the saving proviso that no conveyance or other act of the wife shall deprive the husband of any estate he may become entitled to as tenant by the curtesy; and by the 16th section she can devise land, but not so as to deprive the husband of any right he may have acquired as tenant by the curtesy. The effect of the whole is to leave the husband in the enjoyment of the estate after the death of the wife, which is properly designated that of tenant by the curtesy, but to divest him of any estate (as by curtesy initiate or by marital right) theretofore enjoyed during their joint lives. The inchoate estate is, practically speaking, contingent till the wife's death, and cannot be regarded as vested except for certain purposes belonging to a system of obsolete law, and it appears not to have been the intention of the Legislature to preserve that incipient title, but to have respect to it only, when like dower it became consummated by the operation of death in severing the marriage. The effect of the act is to equalize the condition of husband and wife as to the property possessed by each during their joint lives.

If this be a correct exposition of the law, then the husband in this case had no right or authority of his own motion to put any one in possession of his wife's land. It was hers during the marriage to have, hold, and enjoy free from his control or disposition. Whether she concurred or did not concur in what was being done, the time con-

Judgment.

Boyd, C.

Judgment. templated by the Statute of Limitations began to run
Boyd, C. against her upon the removal of her disability to sue by
reason of coverture, which was on the 1st July, 1876,
38 Vic. ch. 16, secs. 1, 5, 16, (O.). Failing any assertion
of right on her part, the parliamentary title of the defend-
ant to the land, would appear to be complete in July,
1886, so far as this aspect of the case is concerned.

I do not think that any act or representation of the
defendant is in evidence, which could so operate, whether
by estoppel or otherwise, as to change to the plaintiff the
estate if it was already vested in the defendant.

If the old law as to the status and rights of a husband
after the birth of issue in respect of his wife's land had
been left intact by legislation, I should have been forcibly
impressed in favour of the view that the wife's right
to recover was not affected by the Statute of Limitations.
By that law, it would seem that the husband, as tenant
by the curtesy initiate, might lease his wife's lands
during his own life, and that as against him or his
tenant, the wife would have no right of entry. See
Crabb's Real Property, vol. 2, sec. 1091, p. 107, and the
adverse criticisms passed upon *Doe d. Corbyn v. Bramston*,
3 A. & E. 63, by able lawyers, in 1 Bythewood's Conveyanc-
ing, by Sweet, 3rd ed., p. 38, and in last ed., (4th), p. 37, the
same observations are continued, and in Bright's Law of
Husband and Wife, p. 181.

If the wife had no right of entry as against the defend-
ant till the husband's death in 1884, then the action would
be effective as regards the time limit. But as I have con-
cluded that all interference on the part of the husband
during the joint lives is ended by the first Married
Womans' Act in the Province, this line of decision is no
longer available.

After communicating our conclusions on the case as
argued, the plaintiff sought a further hearing upon a point
not specially adverted to by him—viz., touching the effect
of the mortgage made by the owners in 1881. Upon
this, further argument was permitted, and the conclusion

we have reached has been treated at some length by my brother Ferguson. It will not be needful for me to do more than state shortly my view of the law on this head.

Judgment

Boyd, C.

The plaintiff's title is derived from a conveyance under the power of sale contained in a mortgage made by the owners in 1881. Assuming that the right of entry accrued forthwith under the mortgage upon its execution, that would be the point of time from which the statute would begin to run, as against those claiming under the mortgage; and this action is in time, unless the defendant can rely upon his possession prior to the making of the mortgage.

It has been taken for granted in expressions used in some cases, (though not so decided) that if the statute has begun to run in favour of the occupant prior to the owner mortgaging the property, it will continue to run as against the mortgagee. But the decision in *Heath v. Pugh*, 6 Q. B. D. 345, and 7 App. Cas. 235, has placed in clear light the relations of mortgagor and mortgagee, and since the Judicature Act, the equitable doctrine prevails.

By that doctrine, the conveyance of the legal estate to the mortgagee was regarded merely as security for a debt, and upon the mortgagee's death, both debt and security passed to the executor. The interest in the land is not in the mortgagee, but remained in the mortgagor. Possession might be taken by the mortgagee upon default, but that is a very distinct and different thing from possession as owner of the estate. The title of the mortgagee is an equitable title; the right of possession upon that mortgage title first accrues after the making of the mortgage; and the Statute of Limitations *quoad* possession of the land, can only run as from that time.

The right of entry exercisable by the mortgagee, is a very different and distinct thing from the right of entry still remaining in the mortgagor. If, before this right of entry under the mortgage is barred by the statute, proceedings are taken to foreclose or sell under the power of sale contained in the mortgage, the completion of such foreclosure or sale vests a new absolute title as owner in the

Judgment. then holder of both legal and equitable estates reunited,
Boyd, C. from which would arise a new point of departure in the running of the Statute of Limitations against any occupant of the land.

The right to proceed in equity on the mortgage would first accrue after the making of the mortgage, and as soon as default arose, and it is an eminently reasonable construction to give to the Statute of Limitations that the right to enter upon the land first accrues to the mortgagee at the same time. Such is the construction to be found in Mr. Brown's Commentary on the Statute, 1 Vic. ch. 28, (which is in effect reproduced in R. S. O. ch. 111, sec. 22). He says at p. 451, ("Limitations"): "Where, since this statute, the mortgagee is entitled to enter immediately upon the execution of the mortgage deed, and no interest has been paid, the right of the mortgagee first accrues on such execution." Of course, in cases where the occupant has acquired title by length of possession before the mortgage, the making of the mortgage passes nothing to the mortgagee; but such is not the case in hand.

Judgment should, therefore, go for the plaintiff with costs.

FERGUSON, J. :—

Gardiner and his wife were married prior to the year 1848—it was said in the year 1841. The property was conveyed to her by a stranger (Ross) in the year 1865. It would be unreasonable to suppose in the absence of evidence on the subject, that there was any marriage contract or settlement affecting this property. The marriage and the acquisition of the property being both before the passing of the Act of 1872, the Act that applied to the case, was the Act known as the Married Woman's Property Act of 1859. The 4th section of that Act preserved to the husband any estate that he might become entitled to as tenant by the curtesy notwithstanding any conveyance or other act of the wife. The 16th section preserved to him

any right that he might have acquired as tenant by the Judgment. curtesy, notwithstanding a devise or bequest by her. The Ferguson, J. wife is still living.

In the year 1881, she made a mortgage of the property. In this mortgage the husband joined as a granting party. In it was contained a power of sale under which the property was sold and the rights imparted by such sale have through conveyances come to the plaintiff, it being admitted that he, the plaintiff, now shows a good paper title.

In 1869, the defendant was put into possession by the husband Gardiner, and not by the husband and wife. So finds the learned Judge. Gardiner, the husband, died in 1884.

This property could not have been reduced to the possession of the husband on the 4th day of May, 1859, because neither he nor his wife had it till 1865. Under the provisions of the 2nd section of the Act, she was in a position to have hold and enjoy the property free from his control, &c., in as free and ample a manner as if she were sole and unmarried, any law, usage, or custom to the contrary, notwithstanding, unless the reservation respecting curtesy in the Act made this different.

The curtesy seems to be the estate of the husband after the death of the wife if issue born, &c.: Williams on Real Property, 266, 16th ed. Curtesy is the estate after the wife's death. It is initiate at the birth of issue that might inherit, and it is consummated at the death of the wife, and no entry is necessary to complete the estate: Wharton's Law Lexicon Tit., "Curtesy of England." The death of the wife is necessary to make the estate consummate and complete: Christian's Blackstone, vol. 2, pp. 126, 129, The death of the wife is the last of the four things absolutely necessary to consummate the tenancy or estate by the curtesy, and I am of the opinion that what is meant by the words, "*any estate he may become entitled to as tenant* by the curtesy," in the 4th section is the estate after the death of the wife; and nothing but this estate

Judgment. can be meant by the right spoken of in section 16 of the
Ferguson, J. Act.

The opposite view, or indeed any other view, would be antagonistic to the enacting words of section 2 of the same Act, for if the husband, by reason of the curtesy initiate would have a right to the rents and profits, &c., the wife could not hold and enjoy free from his control as provided for in this section.

Under the circumstances disclosed, I think the wife had the right to have, hold, and enjoy the property free from any right of control by the husband, arising by virtue of the marriage or by virtue of the curtesy *initiate*; and, assuming this to be so, the fact that the defendant was put into possession by the husband, took no effect whatever upon the rights of the wife under the statute, it not being shown that there was any agency to do the act, or any consent on the part of the wife.

The defendant has been in possession since 1869. The full period of twenty years from that time had not expired before the act of disturbance that gave rise to this litigation, or before the commencement of this action.

Mrs. Gardiner was under a disability—that of coverture—until the first day of July, 1876. By the Act that then came into force as to her and those in her position, this disability was removed, and there was then nothing, so far as I am able to perceive, to prevent her from bringing and sustaining an action to recover possession of the land from the defendant. The Statute of Limitations commenced then I think to run against her and in the defendants favor.

From this a conclusion had been arrived at affirming the judgment of the trial Judge, and in favour of the defendant. It was, however, said that a matter that had been mentioned but not made the subject of argument had been overlooked. This was as to the effect of the making of the mortgage upon the property by Mrs. Gardiner and her husband, and the sale under the power of sale contained therein, upon the position of the defendant in respect

to his contention that the statute had before the commencement of this action run in his favour, and the title become extinguished so that he was able successfully to resist an action for the possession of the land. This question has now been argued and is to be determined.

In the case *Heath v. Pugh*, 6 Q. B. D. 345, the Court of Appeal by a judgment (afterwards affirmed in the House of Lords, 7 App. Cas. 235), reversing the decision of the Common Pleas Division, decided that time commenced to run against the mortgagee, either from the date of the mortgage deed, or from the day fixed for redemption on payment of the principal money secured by the deed, certainly not more than a year afterwards, (there had been no possession by the mortgagee; no payment of principal or interest to him, nor any acknowledgment of his title,) but that the time having that commencement could only run against the mortgage title then vested in the plaintiffs, and that the plaintiffs having commenced their action of foreclosure within the statutory period, and in such action obtained a final order of foreclosure, they thereupon gained a new and different title which was the title to the land which they before had not, and that as to this title the statute then began to run against them, and they had again the statutory period within which to bring their action for the recovery of the possession of the land as owners, which, as is clearly pointed out in the judgment of the Court delivered by Lord Selborne, L. C., is a possession, entirely different from the possession of a mortgagee, referring to the remarks of Lord Manners in *Blake v. Foster*, 2 Ball & B., at p. 403, where that learned judge said "there can be no two things more distinct or opposite than possession as mortgagee, and possession as owner of the estate; nor can anything be more hazardous or inconvenient than the possession of a mortgagee; the manner in which he is called to account is most rigorous and severe."

In this judgment many authorities are referred to, and the positions and respective titles of mortgagor and mortgagee very fully considered. Attention is called to the

Judgment.
Ferguson, J. provision of the Judicature Act, whereby a mortgagor entitled for the time being to the possession of the land, as to which no notice of his intention to take possession has been given by the mortgagee, is recognized as having a right in respect of which it was thought fit that he should be enabled to sue for possession, &c., in his own name. The nature of an equity of redemption, is considered, and quoting from Lord Hardwicke, in *Casborne v. Scarfe*, 1 Atk, 603, it is said that it cannot be considered a mere right, but an estate "whereof there may be a seisin," that the person entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets; that the effect of an order of foreclosure absolute, is to vest the ownership of the land for the first time in the person who was previously a mere encumbrancer: that this is considered as a "new purchase" of the land, and that it follows from this state of the law, that when the owner of land under an ordinary decree of foreclosure absolute takes proceedings to recover possession of that land, he seeks possession of that which by a title newly accrued has for the first time become his own property.

The language of our Act, sec. 22, ch. 111, R. S. O. is substantially the same, excepting the difference as to the period, as that of the English Act: "Any person entitled to or claiming under a mortgage of land, may make an entry or bring an action to recover such land, at any time within ten years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than ten years have elapsed since the time at which the right to make such entry or bring such action first accrued."

It was contended that this provision applies to cases only where there has been such a payment, and that as a consequence where there has not been such a payment, a possession of the land by a stranger against the mortgagor prior to the making of the mortgage, is a possession to be reckoned against the mortgagee in ascertaining whether or not the statute has run against him.

This contention cannot, however, be sustained. The Judgment. clear and pointed words of Lord Selborne who delivered Ferguson, J. the judgment of the Court of Appeal in *Heath v. Pugh*, are entirely against it; and the judgment in all its parts seems to have been adopted and affirmed in the House of Lords. In *Brown on Limitations*, p. 451, the words of the author seem to mean the same thing as this passage in the judgment in *Heath v. Pugh*, and I do not see that it is against what is said in Mr. Leith's work referred to and relied on by counsel.

In *Doe d. Palmer v. Eyre*, 17 Q. B. 366, it was held that the mortgagee was entitled to recover, though the mortgagor's right of entry within the meaning of 3 & 4 Wm. IV., ch. 27, had accrued before the mortgage, and was barred by the statute by lapse of time before the commencement of the action. In delivering the judgment, Lord Campbell said, at p. 372: "A case may be put where a person who has occupied as tenant by sufferance nearly twenty years without payment of rent or written acknowledgment might be deprived of the benefit of the Statute of Limitations by the owner mortgaging the premises and going on, for a great many years afterwards, paying interest to the mortgagee. But it cannot be considered to have been an object of the Legislature to protect the interest of such a person." This case is referred to, and the principle of it adopted and acted upon in *Hooker v. Morrison*, 28 Gr. 369. This was, however, a case in which there had been payments made upon the mortgage. *Boys v. Wood*, 39 U. C. R. 495, was a case of a like character, and at p. 499, the Court said: "In short, we are of opinion that the right of entry of the mortgagee * * did not accrue until after the making of the mortgage; and as this was within twenty years of the bringing of the action, the plaintiff is entitled to recover."

A question arose as to whether or not the purchaser under the power of sale contained in the mortgage whose rights have come to the plaintiff, was a person "claiming under the mortgage" within the meaning of this clause in the statute. This is, I think, answered by authority.

Judgment. In *Doe d. Baddeley v. Massey*, 17 Q. B. 373, the purchaser paid principal and interest due on the mortgage and took a conveyance, in which the mortgagor and mortgagee joined, of the premises and of the mortgagor's equity of redemption and all the residue of his interest, and it was held that he was a person claiming under the mortgage within the meaning of 7 Wm. IV., and 1 Vic. c. 28. In delivering the judgment, Lord Campbell said: "But, suppose the mortgage deed contains a power of sale, may the mortgagee not transfer the same right to a purchaser," and further on, "On payment of the mortgage money the mortgage ceases to exist as a security for money; but the person to whom the mortgagee conveys his legal interest *claims under the mortgage*, although the equity of redemption should likewise be conveyed to him." In the case of *Ford v. Ager*, 2 H. & C. 279, where counsel had referred to *Doe d. Palmer v. Eyre*, and *Doe d. Baddeley v. Massey*, as being decisive as to the true construction of the statute he was stopped by the Court.

The statute I think, commenced as I have said to run against Mrs. Gardiner upon the removal of the disability, on the 1st day of July, 1876. At any time for the period of ten years after that day she could have maintained an action for possession against the defendant unless after the making of the mortgage, the mortgagee had given notice of his intention to take possession, or to enter into receipt of the rents and profits of the land, (Judicature Act R. S. O. sec. 53, sub-sec. 4.) and her action would have been for the possession of the land as owner thereof (subject to the mortgage.)

After the making of the mortgage and default thereon, the mortgagee could have maintained an action for the possession, but this would be upon the mortgage title, and for possession as mortgagee, a possession quite different from the possession as owner of the land. From the time at which he could have brought such an action the statute would run against him, unless there should have been some proper acknowledgment on payment of interest or principal, to take the case out of its operation.

If he, the mortgagee, had brought an action of foreclosure and obtained a final order therein, according to the decision in *Heath v. Pugh*, the statute would have again commenced to run against him at the date of such final order, for then, for the first time, he would have been in a position to bring an action for the possession of the land as owner thereof. Then it would have been that what is called his "new title" first accrued as stated in the judgment of *Heath v. Pugh*. Judgment.
Ferguson, J.

The mortgagee did not, however, bring the action for foreclosure, but sold the lands under the power of sale contained in the mortgage, and under the authorities of *Heath v. Pugh*, and *Doe d. Baddeley v. Massey*, there appears to me strong ground for saying that the statute first commenced to run against the purchaser under this power of sale, when he so acquired his title; but, it is not necessary to decide this, because, according to the decisions in *Doe d. Baddeley v. Massey*, and *Doe d. Palmer v. Eyre*, this purchaser "claimed under the mortgage," and his title came to the plaintiff; who, it is admitted, has a good paper title, and the statutory period of ten years had not elapsed after the making of the mortgage, and before the commencement of this action.

The case comes then to this, the defendant has no title but the possession. The plaintiff has a good paper title, and although the defendant has been so many years in possession in fact, the statute did not commence to run against the title that the plaintiff now has until (at the earliest possible period) the date of the making of the mortgage, less than ten years before the commencement of this action. The plaintiff must therefore succeed. The judgment will, for these reasons, be reversed with costs to the plaintiff.

Judgment for the plaintiff with costs.

G. A. B.

[QUEEN'S BENCH DIVISION.]

MARTIN V. McMULLEN ET AL.

Bankruptcy and insolvency—Assignment for benefit of creditors—R. S. O. ch. 124—Valuing security—Guaranty, construction of.

A deceased person, of whom the plaintiff was executor, gave the defendants a guaranty in respect of goods sold and to be sold to another, in the following terms :—"I hereby undertake to guarantee you against all loss in respect of such goods so sold or to be sold, provided I shall not be called on in any event to pay a greater sum than \$2,500."

The principal debtor, being indebted to the defendants in \$5,500, made an assignment under R. S. O. ch. 124, and the defendants filed a claim with the assignee but did not in the affidavit proving the claim state whether they held any security or not. At a later date the plaintiff paid the defendants the \$2,500 and filed a claim with the assignee. The dividends from the estate were insufficient to pay the balance of the defendants' claim :—

Held, that the guaranty was not a security which the defendants were required to value under the Act, and that the omission from their claim of a piece of information which could not affect it did not render it invalid :—

Held, also, that this was a guaranty, not of part, but of the whole of the debt, limited in amount to \$2,500, that is, a guaranty of the ultimate balance after all other sources were exhausted ; and the plaintiff was not entitled to rank upon the estate in respect of the \$2,500, nor to recover any part of any dividend which the defendants had received.

Hobson v. Bass, L. R. 6 Ch. 792, distinguished ; and *Ellis v. Emmanuel*, 1 Ex. D. 157, followed.

Statement. THIS action was tried before STREET, J., at the Woodstock Spring Assizes, on 14th March, 1890.

The following facts were proved or admitted : On 8th March, 1888, McGachie Brothers carried on business at Woodstock, and were indebted to the defendants Ogilvy, Alexander, & Anderson, wholesale merchants in Toronto, McGachie Brothers on that day, being desirous of obtaining further goods from Ogilvy & Co., procured Jonathan Martin to give them a guaranty, of which the following is a copy :

" Messrs. Ogilvy, Alexander, & Anderson, Toronto.

Dear Sirs :

In consideration of the goods sold by you on credit to McGachie Brothers of Woodstock, and of any further goods which you may sell to McGachie Brothers upon

credit during the next twelve months from date, I hereby Statement.
undertake to guarantee you against all loss in respect of such goods so sold or to be sold, provided I shall not be called on in any event to pay a greater amount than \$2,500. You shall have the right to accept and release collateral securities, to extend the time for payment, take notes or bills in settlement for goods sold or to be sold, and renew the same, compromise or compound the said indebtedness, either during the said period or afterwards, without notice to me.

J. MARTIN."

On the 27th May, 1889, McGachie Brothers made an assignment to the defendant McMullen, under the provisions of ch. 124, R. S. O.

At the time this assignment was made McGachie Brothers were indebted to the defendants Ogilvy & Co. in the sum of \$5,500, or thereabouts. On the 6th June, 1889, they filed with the assignee an affidavit and particulars of their claim, but did not in this affidavit state whether they held any security or not. On 7th June, 1889, a meeting of creditors was held pursuant to the statute, at which a member of the firm of Ogilvy & Co. attended and voted in respect of the claim so filed, without objection.

The guarantor, Jonathan Martin, died, and the plaintiff was his executor.

On 26th September, 1889, the plaintiff, as such executor, paid to Ogilvy & Co. the \$2,500 secured by the guaranty, and filed with the assignee a claim to rank for that amount upon the estate.

On 7th October, 1889, Ogilvy & Co. filed with the assignee an affidavit that at the time of the filing of their claim they had not, that they now had not, and never had, any security for their claim which they were required or bound to value under the statute.

On 10th October, 1889, Ogilvy & Co. served a notice on the plaintiff contesting his right to rank upon the estate.

On 15th October, 1889, the plaintiff brought this action

Statement.

praying for a declaration that he was entitled to rank as a creditor of the estate in respect of the sum of \$2,500 paid by him to Ogilvy & Co. The defendant McMullen defended the action under the direction of the inspectors of the estate. The defendants Ogilvy & Co. insisted upon their notice of contestation, and urged that the plaintiff could not be substituted for them in ranking upon the estate in respect of the \$2,500 paid by him, without paying their whole claim.

It was admitted that the dividends upon the estate would not be sufficient in any event to pay the balance of Ogilvy & Co.'s claim.

The case was argued at the conclusion of the evidence.

S. G. McKay, for the plaintiff, contended that the claim filed by Ogilvy & Co. on 6th June, 1889, was not in accordance with the statute, sub-sec. 4, sec. 19, ch. 124, R. S. O., because no mention was made in it of the guaranty; and it did not appear from the claim, as it should have done, whether the claimants held security or not; that the claim, if proved at all, could not be taken to have been proved until the filing of the supplemental affidavit of 7th October, 1889; and that before the filing of that affidavit, their claim had been reduced by the payment of the \$2,500, and was only properly provable for the balance. Upon the question of the construction of the guaranty he referred to *Hobson v. Bass*, L. R. 6 Ch. 792; *Gray v. Seckham*, L. R. 7 Ch. 680; *Ellis v. Emmanuel*, 1 Ex. D. 157.

Gibbons, Q. C., for the defendants, referred to sec. 20 of R. S. O. ch. 124; *Kellock's Case*, L. R. 3 Ch. at p. 783; *Armstrong v. Drew*, decided by ARMOUR, C. J., in September, 1887, (unreported.)

March 21, 1890. STREET, J. :—

The guaranty held by Ogilvy & Co. does not appear to be a security which they were required to value under the Act. See *Ex parte English and American Bank*,

L. R. 4 Ch. 49, and the cases there referred to. They were, therefore, entitled to rank for their full claim on 7th June, 1889, and I cannot hold that the omission from their claim of a piece of information which could not affect it, rendered the claim invalid. See *Kellock's Case*, L. R. 3 Ch. at p. 783; *Eastman v. Bank of Montreal*, 10 O. R. 79.

Judgment.

Street, J.

It was then contended on the part of the plaintiff that the form of the guaranty here was in substance the same as that in question in *Hobson v. Bass*, L. R. 6 Ch. 792. In that case Jesse Hobson gave to Bass a guaranty as follows:

"I hereby guarantee to you the payment of all goods you may supply to Edmund Hobson, but so as my liability to you under this guaranty shall not at any time exceed £250." Bass supplied goods to Edmund Hobson to the amount of £657. Edmund Hobson then became bankrupt. Bass proved for the £657, and then called on the guarantor, who paid him £250. Bass then received a dividend of 2s. 1d. on the £ on the £657. It was held that the guarantor was entitled to a part of this dividend bearing to the whole the same proportion as £250 to £657.

Lord Hatherley in his judgment points out that the question is whether the guarantor means, "I will be liable for £250 of the amount which A. B. shall owe you," or "I will be liable for the amount which A. B. shall owe you, subject to this limitation that I shall not be called on to pay more than £250." In the former case the surety, being answerable for a particular part of the debt which he pays, is entitled on payment of that part of the debt to stand in the creditor's shoes with regard to it, and to receive the dividend and rank upon the estate in regard to it; in the latter case he is surety for the whole debt, but his liability is limited, and he is not entitled to rank until he has paid the whole debt. The distinction is further illustrated and all the cases collected in *Ellis v. Emmanuel*, 1 Ex. D. 157.

The guaranty in question must be taken to be a guar-

Judgment. antee, not of a part, but of the whole of the debt due
Street, J. Ogilvy & Co., limited in amount to \$2,500, because it
purports to guarantee them "against all loss," that is, as I
read it, a guaranty of the ultimate balance after all other
sources are exhausted. It falls, therefore, within *Ellis v.*
Emmanuel, and not within *Hobson v. Bass*.

There should, therefore, be a declaration that the plaintiff is not entitled to rank upon the estate in respect of the \$2,500 paid to Ogilvy & Co., nor to recover any part of any dividend which they have received upon their debt; and the plaintiff should pay the defendant's costs.

[On the 22nd May, 1890, an appeal from this decision was argued before the Queen's Bench Divisional Court. Judgment was reserved.]

[CHANCERY DIVISION.]

REYNOLDS V. JAMIESON.

*Husband and wife—Action for breach of promise of marriage—Nonsuit—
Release by promisee.*

In an action for breach of promise of marriage the plaintiff's evidence was that after promising to marry her in 1885, the defendant in March, 1886, visited her and repudiated his promise, whereupon she ordered him out of her house, and refused afterwards to renew the engagement. The trial Judge nonsuited the plaintiff on the ground that this amounted to an absolute release, and that the relationship between the parties was terminated.

Held, that the defendant having previously violated his engagement, the matter should have been left to the jury, who might have reasoned that the plaintiff chose to consider the connection at an end, and that she was not willing to subject herself to the pain and mortification of being again deceived.

THIS was an action for breach of promise of marriage, *Statement.* brought by Sarah Jane Reynolds against Samuel Jamieson under circumstances sufficiently stated in the judgment of BOYD, C., below.

The action was tried at Peterborough on April 23rd, 1889, before Mr. Justice MACMAHON and a jury.

At the close of the evidence the following took place:—

Mr. Osler.—I submit there is no case. The promise for which there is corroborative evidence ends with her turning him out of the house, it ends with this: "I ordered him out, he wanted the engagement renewed but I would not consent to it." So that there is an absolute release there. There is no action for that promise; that terminated the relationship between the parties. He left in March, 1886, and the action which she brings must be founded on the promise in June following. For that promise there is no corroborative evidence under the Act. Reading from her own examination these are the words she consented to in the box here: "After I ordered him out he wanted the engagement renewed but I would not consent to it; I ordered him out of the house, I did not want to have anything more to do with him; after I ordered him out he wanted the engagement renewed but I would not consent to it." I will put in those extracts so that there will be no question about it.

HIS LORDSHIP.—I think perhaps that sending out of the house would be sufficient.

Mr. Osler.—Then the June offer stands by itself altogether without corroboration, all the circumstances indicating that there was no promise at that time. She says he was bound and she was not. The interview stands altogether uncorroborated, and the facts remained that he never

Statement. came back to see her from March, 1886, at all, showing that no relationship as would take place between engaged parties existed between them. There was an absolute severance of intercourse between them till the interview in June which she claims was a new promise, and so it simply stands with her turning him out of the house and saying she would have nothing more to do with him, and his never coming back, and her action stands on her unaided testimony as to the June interview. There was a relinquishment in March and there is no new promise under the statute. So I say there is nothing to go to the jury in the matter.

Mr. Watson.—As far as the March incident is concerned, there is no evidence of a relinquishment at that time. There was an unpleasantness arising out of some statements by the defendant, these statements causing some anger to the plaintiff, but there is no evidence showing that at that time she released the defendant from his obligation to her entered into by the contract. My learned friend will search in vain for any such evidence from her. Leaving the transaction as it was in March we have the contract proven beyond doubt, and if it went no further there would be the breach committed at that time, and without any relinquishment or release. What occurred afterwards was by the defendant promising to marry her at a subsequent time ; there was no relinquishment in respect to the contract preceding that. It was merely fixing different terms for the marriage. By the contract before, the marriage was to take place in the spring of 1886. Then the occurrences have been mentioned which caused Jamieson to think he could not get married then but would have to postpone it. After that she consented to marry him if he came along at a subsequent time ready to marry her. She might have relied at that time. * *

HIS LORDSHIP.—What would be the position of the parties supposing they had corresponded from October to March, and he had gone there and she had turned him out saying she was not going to have anything more to do with him, and there had not been any renewal of the correspondence, wouldn't that be regarded as an exoneration ?

Mr. Watson.—Not an exoneration by her ; it was a breach by him.

HIS LORDSHIP.—She turns him out of the house where he had been visiting as an accepted suitor, and no correspondence took place between the parties during the two years.

Mr. Watson.—This evidence from her is to be regarded in view of the circumstances as they existed at that time. It was not a matter of deliberation on her part ; she had not concluded deliberately that she would not continue the relationship, but at that time she was provoked to anger and said "leave my house," and it does not go beyond that. I submit there is nothing in that to show a deliberate act on her part to release the defendant.

HIS LORDSHIP.—You desire to go to the jury on that promise which you say continued up to March, and that the promise was broken by him ?

Mr. Watson.—The defendant at that time stated that he had never agreed to marry her, that he had no idea of marriage with her, and if

that statement was correct there was a breach committed by him. I desire to go to the jury on the breach of the contract existing up to that time, and also the breach in future. Statement.

HIS LORDSHIP.—Your argument is that it was a continuation of the old contract that was existing ?

Mr. Watson.—Entirely, yes. The plaintiff says after overcoming her anger she was perfectly willing to marry the defendant, and she would have married him immediately after this Clara was married. Apart from that there is corroboration even in respect to the June interview. * *

Mr. Osler.—The evidence that is here from her own mouth is incisively stated in the extracts I have given, and the extracts that I have given make it quite clear that there was a positive release in March : “I did not want to have anything to do with him ; I put him out of the house ; he renewed his offer to marry me : I declined it.” It is positively in evidence that on that occasion he wanted to make it up : “I declined to have anything to do with him ; I put him out of the house.” I put in those extracts.

Mr. Watson.—I object to those extracts going in.

HIS LORDSHIP.—Well, I do not think there is anything at all to go to the jury in this case. I think that the evidence discloses that at that interview in March 1886, just at the time when it was supposed that the plaintiff and defendant were going to marry, that she put an end to the engagement by ordering him out of the house ; that there was a complete exoneration at that time, the plaintiff threatening to bring an action for the recovery of damages ; that at the subsequent interview in June what he stated then, as far as we know from the plaintiff's own evidence, is that he wanted a renewal of the engagement, and she does say that the engagement was renewed at that time, but she says she refused to allow him to come to the house till after Clara got married, and she also states that till Clara got married she was under no binding engagement to marry. That was the statement which she deliberately made before the examiner, and I think she is bound by it. There was no renewal of the intercourse between the parties between March, 1886, and November or December, 1888, when the defendant got married, and from the non-communication and from her action all through, I think there was an exoneration of the defendant from all liability in respect of any promise to be married to her. The action must be dismissed.

Mr. Watson.—Will your LORDSHIP direct a stay of proceedings ?

HIS LORDSHIP.—To jury. After hearing the case presented on behalf of the plaintiff I concluded that there was not a case to go to you and therefore the defendant has not been called upon to enter on his defence, and I have ordered judgment to be entered for the defendant, dismissing the plaintiff's action with costs.

The plaintiff now made a motion to the Divisional Court of the Chancery Division for a new trial, and the matter came on for argument before Boyd, C., and Ferguson J. on June 13th, 1889.

Argument.

Edwards, for the plaintiff.*Douglas*, for the defendant,

September 12th, 1889. BOYD, C.:—

The plaintiff sets up a promise to marry in October, 1885, and a repudiation thereof by the defendant in March, 1886. She then avers a renewal of the promise in June, 1886, to take effect when a certain girl should leave the defendant's house, and that this engagement continued till November, 1888, when the defendant married another woman. The defendant denies any promise to marry at any time. He pleads that in March 1886, the plaintiff ordered him to leave her house (which he had entered on her invitation) and never to return again. He pleads further, that even if he did agree to marry the plaintiff that agreement was before breach ended by mutual consent. This defence in effect amounts to a plea of rescission by both, and to a suggestion of a plea that the engagement had been broken off by the plaintiff in March, 1886. The first promise was proved by sufficient evidence; the last rests on the sole evidence of the plaintiff. Her account of the termination of the first promise was that in March, 1886, the defendant visited her and told her, "I never asked you to marry, or came to marry you, I never was promised to you," whereupon she got vexed at him and ordered him out of the house. A part of her depositions before trial was put in, in which she said, "I ordered him out, he wanted the engagement renewed but I would not consent to it." Upon this a non-suit was moved on the ground that this amounted to an absolute release, and the relationship between them was terminated. The learned Judge took this view that her ordering him out of the house amounted to a complete exoneration of the defendant. I cannot accept this as a necessary conclusion to be drawn from the evidence; it was a matter proper to be submitted to the jury. If he put an end to the engagement by saying he had never asked her to marry and was never promised to her, there was nothing very extraordinary in her asking him to leave

the house as a "faithless deceiver." Assuming the prior engagement to be well proved, this language of his was an insult to which she was not obliged to submit, and which might well justify what she admits doing in telling him to leave the house. But there is evidence of his having broken the contract before she said this and her action was one of the consequences resulting from that breach. In *Kraebryer v. Roiter*, a case reported in 60 Am. Rep. 263, it was held that a breach being proved it was no defence that the plaintiff afterwards gave up her engagement ring to the defendant. And in another case by a strong Court of *Southard v. Rexford*, 6 Cow. (N. Y.) 254 it was held that after a defendant has once broken his promise his offer to renew it is no defence to an action for the breach. Applying the language of the Court in that case to this "she chose to consider the connexion between them at an end, the defendant having previously violated his engagement, and she was not willing to subject herself to the pain and mortification of being again deceived." So might the jury reason, and perhaps they would in this case, notwithstanding the age of the parties and the business-like character of the whole proceedings. I deal now with the case simply as it was put by the defendant's counsel and as it was discussed by the Judge in directing a nonsuit. It is not needful to go further into the case so as to consider the position of the plaintiff if her story of a renewal of the engagement at a later date is believed by the jury. That may depend to a material extent upon whether the prosecution of the matter is regarded as a continuation of the original offer or as a new contract, and it may be found that the defendant has not aptly pleaded to meet all the exigencies of the situation.

At present I do not see how the case on the evidence now taken could be withheld from the jury, and for this reason there should be a new trial with costs to the plaintiff, *i. e.* costs occasioned by moving the nonsuit.

FERGUSON, J., I concur in the conclusion.

Judgment

Boyd, C.

[CHANCERY DIVISION.]

KENNEDY ET AL V. HADDOW ET AL.

Lien—Mechanic's lien—Prior mortgage—Subsequent lien—Increase of selling value of land—Priority.

Where there is a registered prior mortgage affecting land and buildings, and a mechanic's lien for subsequent work thereon, the mortgage retains its priority to the extent of the value of the security before the work began, in respect of which the lien attaches, and the lien has priority only to the extent of the additional value given by the subsequent improvements.

And where the owner of a mill subject to a mortgage, intending to have certain improvements effected, which although as regards the work of a lien holder were fully carried out, were otherwise only partially complete and left the mill in an unfinished state :—

Held, that the lien holder was not entitled to priority for the work done, it not clearly appearing that the selling value of the property had been increased thereby.

Where, in a consent judgment in the usual form in lien cases, a reference was made to a local registrar of the Court :—

Held, that an appeal lay from his report, it appearing from the whole judgment that the reference was to him as Master.

Statement.

THIS was an appeal from the report of a Local Registrar.

The action was brought by the firm of William Kennedy & Sons against James Haddow, as owner, and Adam Scott Elliot, as mortgagee, of certain lands against which the plaintiffs claimed a mechanic's lien.

The action was tried at Owen Sound on May 7th, 1889 before MACMAHON, J.

Creasor, Q.C., for plaintiffs.

A. Frost, for defendant Elliot.

A judgment by consent was given declaring the lien on the lands as against the defendant Haddow, and directing a reference to the local registrar at Owen Sound, with all the powers of the Master, to enquire by what amount the selling value of the lands had been actually increased by the improvements caused by the plaintiff's work, etc. It appeared that the property was a mill, and the plaintiffs

were employed to change it from a stone mill into a roller mill, and the old machinery was removed and certain work done towards making it a roller mill, but it was not completed as such. Statement.

The Registrar found by his report that the amount of the selling value of the land had been actually increased by the improvement caused by the work and materials of the plaintiffs, and that they were entitled to a lien for the full amount of their claim.

From this report the defendant Elliot appealed, and the appeal was argued on March 6th, 1890, before BOYD, C.

C. J. Holman for the appeal. The evidence shows the value of the mill was not increased—in fact it was decreased—by plaintiffs, as it was dismantled, and the improved machinery was not put in. The mortgagee gave no consent to the change, and the property will not now realize the amount due on the mortgage. The plaintiffs have no right to a lien in priority to the mortgage under the statute: R. S. O. ch. 126, sec. 5, sub.-sec. 3.

Hoyles, Q.C., contra. The reference was to a local registrar and there is no appeal as from the Master or a local referee: *Nagle v. Latour*, 27 C. P. 137; *Tanner v. Sewery*, 27 C. P. 53; *Wilson v. Richardson*, 43 U. C. R. 365. It was a consent reference: *Webster v. Haggart*, 9 O. R. 27. The plaintiffs did all their work properly, and it was no default of theirs that the new machinery was not provided by the owner. The evidence shows that the change was a necessity.

Holman in reply. There is a right to appeal, and the reference could be had to anyone under R. S. O. ch. 44, sec. 102: *Burns v. Chamberlin*, 25 Gr. 148.

March 8, 1890. BOYD, C.:—

I overrule the objection that no appeal lies from this report because the judgment appears to be by consent, and

Judgment.

Boyd, C.

the reference is to George Inglis, local registrar of the Court at Owen Sound. It may be that this officer has not, at present, the powers of an official referee, and for this reason the parties may have agreed to his selection as a special referee under sec. 102 of the Judicature Act, but it is evident from the whole judgment that the reference is to him as to the Master; for the usual form of judgment in lien cases is followed: see Holmsted, p. 136, form 25, and upon his report the defendant Haddow is ordered to pay.

Now, the judgment went by default in Haddow's case and the Court cannot be intended to have cut him out of an appeal, if dissatisfied. Nor can it be argued that the other defendants should not have an appeal—the matter has been put under reference according to the usual course of the Court—one of the incidents of which is the right to appeal. None of the authorities cited rule the point now under discussion.

Upon the merits of the appeal, I favour the contention of the defendant Elliott. He is first mortgagee, having priority by law upon the mortgaged premises for payment of his security, and before he is postponed to the claim of one who subsequently does work upon the premises it must be clearly proved that the selling value of the land has been increased by the work done.

The clause of the Mechanics' Lien Act (R. S. O. ch. 126,) is sec. 5, sub-sec. 3, which means that the extent to which the selling value of the land has been *actually* increased by the improvements being ascertained, that amount shall have priority to the first mortgage. "*Actually*" is a word not found in the statute, but it is used in the judgment under which this appeal arises, which is framed as I have indicated upon the model in Mr. Holmsted's book (see at p. 138, clause 7).

Now the improvements made here were done in pursuance of a plan for turning the stone flouring mill on the property into a roller mill, and what was done by the plaintiffs was only a part of the alterations necessary for

this purpose. They made such changes as to take out a great part of the interior fittings and replaced them with others suitable for the new project, at an expense of some \$650, but to complete the alterations so as to convert the mill into a roller mill will take an expenditure of some \$2,500 additional.

The work is partially done so far as the contemplated alteration is concerned, though the work done by the plaintiffs is complete in itself. Still the actual result on the ground now is that the mill cannot be used as a stone mill, which was its former condition before the plaintiffs intervened: nor can it be used as a roller mill, for that depends on when the alterations may be completed in the future.

There appears to be great difficulty in working this clause to any satisfactory or reasonable result, unless in cases where the prior mortgage attaches upon the land alone, and afterwards buildings or improvements are put upon it; and in cases where there is such addition or improvement by way of alteration of, or repairs to, existing buildings already covered by the mortgage as gives a distinct and easily recognized additional value to the property. The only sound principle of construction which recommends itself to me is to hold in the case of a registered prior mortgage affecting land and buildings, and a mechanic's lien for subsequent work thereon, that the mortgage should retain its priority to the extent of the value of the security, before the work is begun, in respect of which the lien attaches: and that the lien should have priority only to the extent of the additional value given by the subsequent improvements.

I cannot read the statute as extending to, or, indeed, providing for, such a case as the present: the actual result of the plaintiff's work is to withdraw from the mortgagee part of his security, and the alteration has not gone to completion so as to really enhance the saleable value of the property. For the evidence is most suggestive that the

Judgment.

Boyd, C.

Judgment. place as it now stands incomplete will bring less in the
Boyd, C. market, and is worth less than before it was touched.

In regard to mortgagees, the Court has always been solicitous to protect mortgagors from being improved out of their property, and it strikes me that under this new law the Court must be equally solicitous to protect mortgagees from being improved out of their security. The appeal is allowed, and it does not appear that any good would follow from referring it back for further evidence.

G. A. B.

[QUEEN'S BENCH DIVISION.]

COCKBURN ET AL. V. THE BRITISH AMERICA ASSURANCE COMPANY.

Insurance—Fire—Interim receipt—Powers of local agent—Approval by company—Indorsements on application—Non-repudiation—Prior insurance—Eighth statutory condition—Assent of company—Election not to avoid—Extension.

The plaintiff had for some years insured his mill and machinery therein with the defendants, the policy having been effected through one of their local agents, there being also another insurance with another company. The plaintiff, desiring additional insurance thereon, signed an application therefor, for a portion thereof, through the same agent, on which was an indorsement, of which he was unaware, and to which his attention was not called, that where steam was used for propelling purposes the proposal was required to be submitted to the defendants before the interim receipt was issued. The agent issued the interim receipt to the plaintiff at the time of the proposal, as was his practice, recognized by the defendants. The application, which contained a statement, without the names of the companies, of the amount of additional insurances effected elsewhere and also the amount of the prior insurance, was sent by the agent to the defendants, but was mislaid by them after they had made from it certain extensions on the policy, which had also been forwarded to them for that purpose.

About two months after the date of the interim receipt the defendants wrote their agent declining to continue the risk on the interim receipt, retaining however the portion of the premium earned, at the same time re-insuring half the risk. Of this the plaintiff was not informed, nor was any portion of the premium repaid him :—

Held, that the indorsements formed no part of the application signed by the plaintiff, and that the agent was acting in the apparent scope of his authority, and was to be deemed *prima facie* to be the agent of the company ; and as the defendants never repudiated the contract, but merely determined to put an end to it and treated it as a subsisting contract, they were liable upon it.

Under the 8th statutory condition the defendants claimed that they were not liable upon the receipt because there was prior insurance in another company and their assent did not appear in and was not indorsed on the policy, or that they were not liable upon their earlier insurance because of the subsequent insurance in other companies without their assent :—

Held, that the application and the interim receipt constituted the contract of insurance, and as in this contract the total amount of insurance was truly stated, and the contract continued to be binding until after the loss occurred, the defendants must be considered to have assented to such insurance, and would be compellable to make their assent appear in or to have it indorsed on their policy if such policy were issued :—

Held, also, that the prior insurance was voidable, not void, and that the defendants, after the subsequent contract was entered into in which the total amount of insurance was stated, and after they knew that it was entered into, had elected not to avoid the prior insurance, but to treat it as still subsisting by extending it.

Semble, that the defendants, having assented to the insurance stated in the contract of insurance, could not assert that the effecting such insurance had the result of avoiding the prior insurance effected by their policy.

Statement.

THIS action was brought upon a policy of insurance made by the defendants in favour of the plaintiffs, dated 26th August, 1886, and numbered 303,029, whereby the defendants insured the plaintiffs against loss or damage by fire to the amount of \$2,500, as follows: “\$750 on his two storey frame shingle-roofed building, 100 x 60, occupied as a steam power saw mill, including frame boiler-house attached, situate at Gravenhurst, on bank of Lake Muskoka, as per diagram for this assurance; \$1,000 on fixed and movable machinery, including shafting, gearing, belting, and pulleys while therein, including tools belonging to and used in connection with said mill; \$100 on force-pump and inspirator while therein; \$200 on boiler and connections therein, including smoke-stacks; \$375 on engine and connections therein; \$75 on refuse carriers therein.” “Further concurrent insurance, \$2,500 Royal.” The policy had been renewed from time to time and was in full force so far as being renewed was concerned, the last renewal receipt being dated the 26th of August, 1888.

The action was also brought upon an interim receipt issued by the defendants, dated 4th July, 1888, and numbered 20, whereby the defendants insured the plaintiffs to the extent of \$1,050 “upon mill and machinery as described in fire application No. 20 of this company,” by which application the said insurance was apportioned as follows: “On building No. 1 on diagram (including gas, steam, and water pipes) 100x60 and attachments \$150. On machinery, shafting, gearing, belting, tools, and pulleys (exclusive of boilers and engines), \$750. On the boilers and connections, including smoke stack, \$45. On the engine and its connections, \$52.50. On force-pump and inspirator, \$37.50. On refuse carriers, \$15.”

The defence set up, amongst others unnecessary to be stated, was that by the terms of the application upon which the said interim receipt was issued the application was required to be submitted to the company for approval before the receipt was issued, and it never was so submitted

or approved, and they also set up as a defence the breach of the eighth statutory condition applicable to the said policy and receipt. * Statement.

The cause was tried at the Sittings of this Court at Toronto in the autumn of 1889 by FALCONBRIDGE, J., and a jury.

It appeared that F. A. Lett & Co. were the agents of the defendant company, and for other fire insurance companies, and had an office at Barrie, and one at Alliston, and through them the insurance granted by the policy sued on was effected and the application therefor was drawn; that there was also an insurance for \$2,500 in the Royal Insurance Company concurrent with the policy sued on; that on the 4th of July, 1888, they effected a further insurance upon the same property, amounting to \$7,000, distributed as follows: Northern, \$1,400; Citizens', \$1,400; Caledonian, \$2,100; Royal, \$1,050; and defendants, \$1,050: that the Citizens' afterwards refused the risk, and the Lancashire was substituted for the Citizens': that the application to the defendants was drawn by F. A. Lett & Co., and signed by Isaac Cockburn, the plaintiff, per F. A. L., and the interim receipt sued on was thereupon issued by F. A. Lett & Co. to the plaintiff Cockburn; that the application was copied, and the copy kept by the agents, and the original was sent to the defendants in the following letter:—

* R. S. O. ch. 167, sec. 114.—The conditions set forth in this section shall, as against the insurers, be deemed to be part of every contract, whether sealed, written, or oral, of fire insurance hereafter entered into * * in Ontario * * and shall be printed on every such policy with the heading *Statutory Conditions*. * *

8. The company is not liable for loss if there is any prior insurance in any other company, unless the company's assent thereto appears herein or is indorsed hereon, nor if any subsequent insurance is effected in any other company, unless and until the company assents thereto, or unless the company does not dissent in writing within two weeks after receiving written notice of the intention or desire to effect the subsequent insurance, or does not dissent in writing after that time and before the subsequent or further insurance is effected.

Statement.

“ ALLISTON, July 17th, 1888.

J. H. EWART, Esq.,

General Agent British America Assurance
Company, Toronto.

DEAR SIR,—Enclosed please find application No. 20, Isaac Cockburn, and by concurrent book post we send policy No. 305,029 for correction; should be buildings and attachment, including boiler-house; should be same as diagram shewn on application No. 20.

Yours truly,

F. A. LETT & Co.,

per Sec.”

The number in this letter 305,029 was an error; it should have been 303,029.

The following letter was sent :

“ TORONTO, July 18, 1888.

MESSRS. F. A. LETT & Co.,

Alliston, Ont.,

Re Policy 303,029, I. Cockburn.

DEAR SIR,—The above policy was returned to us this a.m. What do you wish us to do with it?

Yours truly,

J. H. EWART,

General Agent.”

. No answer was either sent or received to this letter so far as could be ascertained.

The policy referred to in the letter of the 17th of July was obtained by F. A. Lett & Co. from the plaintiff Cockburn when he took application No. 20, in order, at the plaintiff Cockburn's request, that it might be amended as stated in the said letter.

The following indorsement was made upon the policy: “The first item of this policy is hereby extended to cover on boiler house, mill platform, shingle room, and lath room.

TORONTO, July 20, 1888.

J. H. EWART,

General Agent.’

And on the transcript of the policy kept at the head Statement.
office of the defendants the following indorsement was
made: "The first item of this policy is hereby extended
to cover on boiler house, mill platform, shingle room, and
lath room.

Toronto, July 4th, 1888. Fee 50."

On the 15th or 20th August F. A. Lett & Co. made their
return to the defendants of the business done by them in
the month of July, which contained the following item
among others: number of application, 20; name of insured,
Isaac Cockburn; amount insured, \$1,050; rate, $6\frac{1}{4}$; pre-
miums \$35.43; expiration, November 4th, 1888. Upon
seeing this item, Mr. Ewart asked a clerk in the head office
for the application, and it could not be found. Mr. Ewart
thereupon wrote to F. A. Lett & Co. for the application,
and they on August 28th, 1888, replied to him as follows:
"We mailed application No. 20 to you on 17th July, also
303,029, for correction same as diagram for No. 20, which
was done; therefore you must have received application No.
20." This letter could not be found at the head office, and
the copy of it was produced by F. A. Lett & Co. Upon
receipt of it Mr. Ewart wrote to F. A. Lett & Co. as follows:
"Dear Sirs,—Re App. 20, Cockburn—Your explanation
of 28th is received. We are very sorry to trouble you, but
we have searched everywhere for this application, and it
cannot be found. Will you kindly furnish us with a
duplicate?"

What purported to be the copy of application No. 20
kept by F. A. Lett & Co. was thereupon sent to Mr.
Ewart, and he thereupon sent the following letter to F. A.
Lett & Co. :—

"TORONTO, Sept. 7th, 1888.

Messrs. F. A. LETT & Co.,

Alliston, Ont.

DEAR SIRs,—Re App. 20, Isaac Cockburn.

We are sorry, but our instructions are that we must not
write short date risks on saw mills. We must therefore
ask you to take up this receipt at once and return it to

Statement.

this office, and as it has run just over half of the term we have debited you in the sum of \$17.71, as earned. Kindly let us have the receipt at once please, that we may secure a release from our re-insurance."

On the same day, the 7th September, the defendants re-insured for one-half the risk effected by the interim receipt sued on, in the People's Insurance Company of Manchester, N. H.

On the 13th October, 1888, Mr. Ewart wrote to F. A. Lett & Co. as follows: "Dear Sirs—Re App. 20, Isaac Cockburn—We apparently have not received this interim receipt yet, and, gentlemen, this is not the way to treat us. We have a portion re-insured, and you will compel us to incur an expense unnecessarily. We do not use you like that."

F. A. Lett & Co. never informed the plaintiff Cockburn that the defendants had refused this risk, nor did the defendants ever inform him of it, and he was ignorant of it until after the fire, which occurred on the 26th October, 1888. The reason F. A. Lett gave for not informing the plaintiff Cockburn that the defendants had refused the risk was that the defendants did not send him the money to refund to the plaintiff Cockburn, and the fact was that the defendants never did give him or the plaintiff Cockburn the money, but retained the amount. The copy of application No. 20 sent to the head office described the property as "Cockburn's Mill, Gravenhurst, Ont., owner and occupant, Isaac Cockburn, 100 x 60, 13 x 60, 49 x 25, and the lath-room," and comparing these figures with diagram shewed them to represent size of mill, shingle-room, and boiler-house respectively. And in answer to the question: "Insurance. What is the total amount of insurance carried on premises? Give names of companies and amounts;" the statement was "total insurance including this is \$12,000, all concurrent." Questions six and seven, to be answered by the agent, were not answered on this copy. They were: 6. Has this company already any insurance on or in the premises? If so state name and number of

policy and amount. 7. What insurance does this com- Statement.
pany hold within 200 feet of the proposed risk ? N. B.
State name and number of policies and amount insured by
same, and mark number of policies and amount on the
respective buildings on diagram.

Indorsed on this copy of application was the following :
“Special: To be submitted to the company for approval
before receipt is issued;” and the following : “Applications
for insurance on property where steam is used for pro-
pelling machinery must be approved by the head office at
Toronto before the company will be liable for any loss or
damage.” The plaintiff Cockburn’s attention was not
drawn to these indorsements, and he was not aware that
F. A. Lett & Co. had no authority to grant the interim
receipt on this account.

F. A. Lett swore that he had never received any instruc-
tions not to grant an interim receipt under such circum-
stances, and that his practice was to issue such receipts at
once, and the company would issue the policies, dating
them from the date of the receipts. He also swore that
at the time the original application was copied, questions
6 and 7 were not answered, but that he did answer them
in the original application before it was sent to the head
office, and that he never got any inquiries from the
defendants as to what companies were on the risk. Mr.
Ewart swore that it did not make a particle of difference to
the defendants that the Lancashire was substituted for the
Citizens’; that the Lancashire was a better company ; that
his objection to the insurance was not because the names
of the companies holding the insurance were not stated,
nor that they were also insurers, but it was to the amount
he would have objected; that he did not know that the
application covered the same risk as was covered by the
policy till after the fire; that indorsements made on the
policy under the transcripts were in Mr. Bailey’s hand-
writing.

The learned Judge left only one question to the jury :
whether the letter of the 17th July enclosing the applica-

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tion was received by the defendant company, and the jury found that it was. The learned Judge thereupon considered that this finding with the admitted facts was conclusive against the defendants on both branches of the plaintiffs' claim, and directed judgment for the plaintiffs for \$3,589.28, with full costs of suit.

The defendants moved before the Divisional Court to dismiss the action on one or both claims of the plaintiffs.

February 11, 1890. The motion was argued before ARMOUR, C.J., and MACMAHON, J.

Laidlaw, Q.C., for the defendants. The local agent had no power to insure, the mill and machinery being run by steam. The approval of the company was necessary. The plaintiff admits that he read the papers, and he must have seen that it was distinctly stated on the back of the application. I refer to *McCrea v. Waterloo Mutual Ins. Co.*, 1 A. R. 218. Under the eighth statutory condition there must be the assent of the company to the prior insurance, and the assent must appear in or be indorsed on the policy: *Noad v. Provincial Ins. Co.*, 18 U. C. R. 584; *Merritt v. Niagara Insurance Company*, *ib.* 529; *Billington v. Provincial Insurance Company*, 3 S. C. R. 182; *Doull v. Western Assurance Co.*, 12 S. C. R. 446; *Logan v. Commercial Union Ins. Co.*, 13 S. C. R. 270. Suppose the local agent had had power to issue the policy, and had issued it, it would still not be binding without the indorsement of the assent as required. Or, conversely, the prior insurance in this company is void by reason of the subsequent insurance in other companies without assent. There was no assent. There was no dissent it may be said; but the dissent is only to be in case of actual notice, not merely constructive notice: *Graham v. London Insurance Company*, 13 O. R. 132.

Wallace Nesbitt, for the plaintiffs, referred to *McQueen v. Phoenix Insurance Co.*, 4 S. C. R. 660; *Parsons v. Queen Insurance Co.*, 43 U. C. R. 271; *Benson v. Ottawa*

Agricultural Insurance Co., 42 U. C. R. 282 ; *Law v. Argument. Hand in Hand Insurance Co.*, 29 C. P. 1 ; *Hopkins v. Manufacturers' Insurance Co.*, 43 U. C. R. 254 ; *McIntyre v. East Williams Insurance Co.*, 18 O. R. 79 ; *Insurance Co. v. Wolff*, 95 U. S. 326 ; *Smith v. City of London Insurance Co.*, 14 A. R. 328 ; 15 S. C. R. 69 ; Porter on Insurance, 86 ; R. S. O. ch. 167, sec. 114, subsec. 2.

March 8, 1890. The judgment of the Court was delivered by

ARMOUR, C. J.:—

It was contended that there never was any contract of insurance created by the application and interim receipt, because by the indorsements on the application the agent had no power in case of such a risk to make such a contract or to issue such a receipt until the application was submitted to the company for approval and was approved of by them and until such approval the company were not to be liable for any loss or damage.

But this contention is not, in my opinion, open to the defendants.

These indorsements formed no part of the application required to be signed by the plaintiff Cockburn, nor were they ever brought to his notice, and when he made the application and the interim receipt was issued to him the agent issuing it was acting in the apparent scope of his authority, and was to be deemed *prima facie* to be the agent of the company. These indorsements were rather instructions to the agent than warnings to the applicant; the agent had, however, received no special instructions, unless these indorsements could be called such, not to issue in case of such a risk an interim receipt unless the application was first approved by the company, and he was continually doing it, and such receipts so issued had always been recognized by the company. The defendants, more-

Judgment. over, never repudiated the contract of insurance which
Armour, C.J. purported to have been effected by the application of the plaintiff and the interim receipt issued to him, but merely determined to put an end to it, treating it as a subsisting contract and elected to retain the premiums earned thereunder from the time it was made up to the time when they determined to put an end to it and so approved of the contract so made.

As to the contention raised under the provisions of the eighth statutory condition, it must be assumed from the finding of fact, and no doubt the fact was so, that the defendants received the application, and if they did so they must have known that it was for insurance upon the same property already insured by them under their policy; the letter of the 17th of July enclosing the application and referring the defendants to it for information as to the amendment to be made on the policy clearly pointed this out to them; and when they made the indorsement on the policy and on their transcript of it the only sources, according to the evidence, from which they could have derived the information necessary for that purpose were the letter of the 17th of July and the application enclosed therein; and it appears to me abundantly clear that from these sources these indorsements could have been readily made. Bailey, the clerk in the head office who made the indorsements, and who must have known the sources from which he derived the information necessary to make them, was not called as a witness by the defendants.

The statutory conditions are to be deemed to be part of every contract, whether sealed, written, or oral, but these conditions are to be printed only on the policy when issued, and not on any interim receipt or upon any other inchoate contract.

The application and the interim receipt constituted, as I have already said, the contract of insurance between the plaintiff Cockburn and the defendants, and in this contract was stated, and truly stated, the total amount of the insurance on the property insured, and this contract so made

continued to be binding on the company until after the Judgment. loss occurred, and the company therein and thereby Armour, C. J. assented to such insurance, and if it were sought to compel the defendants to issue a policy carrying out the said contract they would be compellable to make their assent to such insurance appear therein or to have it indorsed thereon.

I do not think that the defendants, having assented to the insurance stated in the contract of insurance, could assert that the effecting such insurance to which they had assented had the result of avoiding the prior insurance effected by their policy.

However this may be, the prior insurance effected by the policy was voidable, not void, and they might elect to avoid it or they might elect not to avoid it as they thought proper; and after the contract of insurance was entered into in which the total amount of insurance [was stated, and after they knew that it was entered into, they elected not to avoid the prior insurance, but to treat it as still subsisting by extending it to cover additional property to that in respect of which it was originally effected.

In my view, therefore, the defence under the eighth statutory condition fails.

I refer to *Parsons v. Queen Insurance Company*, 43 U. C. R. 271; *Parsons v. Standard Ins. Co.*, 43 U. C. R. 603; 4 A. R. 326; 5 S. C. R. 233.

The motion must be dismissed with costs.

[QUEEN'S BENCH DIVISION.]

ABRAHAM V. ABRAHAM ET AL.

Alimony—Registration of judgment for—Assignment by defendant for general benefit of creditors—Priorities—R. S. O. ch. 44, sec. 30—R. S. O. ch. 124, sec. 9.

The precedence given to an assignment for the general benefit of creditors by R. S. O. ch. 124, sec. 9, over "all judgments and all executions not completely executed by payment" does not extend to a judgment for alimony registered under R. S. O. ch. 44, sec. 30, against the lands of a defendant prior to the registration of an assignment by him; and a plaintiff in such a judgment is not obliged to rank with the other creditors of the defendant.

Statement.

THIS was an action for alimony, which was tried at Stratford on the 6th April, 1889, before ROBERTSON, J., who gave judgment in favour of the plaintiff declaring her entitled to alimony, and directing a reference to the local Master at Stratford to fix the amount and report.

The local Master made his report, dated 2nd November, 1889, by which it appeared that the defendant Thomas Abraham having under the Act respecting Assignments by Insolvents, R. S. O. ch. 124, made an assignment of all his estate for the benefit of his creditors, to John Hossie, sheriff of the county of Perth, subsequent to the date of the judgment, Hossie had been made a party in the Master's office on the 9th May, 1889.

By his report the Master found that under an order made in Chambers for the payment by the defendant of interim alimony there was due and owing to the plaintiff at the date of the judgment the sum of \$104.50; also that the sum of \$150 per annum would be a proper sum for future alimony, to commence from the 6th of April, 1889, which he directed should be paid quarterly by the defendant Thomas Abraham, or by Hossie out of the defendant Abraham's estate.

The Master also found specially that the judgment in the action was registered in the Registry office for the county of Perth on the 6th April, 1889, and in the Registry

office for the county of Huron on the 8th April, 1889, being Statement. the counties in which the defendant Thomas Abraham had certain lands; that the assignment by the defendant Thomas Abraham to Hossie was dated 8th April, 1889, and was registered in the Registry office for the county of Perth on the 9th April, 1889, and in the Registry office for the county of Huron on the 10th April, 1889.

The defendant Hossie appealed from the report; the main ground of the appeal being that under sec. 9 of R. S. O. ch. 124 the assignment from the defendant Thomas Abraham to the defendant Hossie took precedence of the plaintiff's judgment, and that she was only entitled to rank as a creditor with the other creditors of Thomas Abraham upon his estate in the hands of the appellant, the assignee thereof.

The appeal was argued before MACMAHON, J., in Court on 29th November, 1889.

Idington, Q. C., for the appellant. R. S. O. ch. 124, sec. 9, is express in its terms—"An assignment for the general benefit of creditors under this Act shall take precedence of all judgments and of all executions not completely executed by payment." As against this provision the plaintiff's judgment is nothing more than a registered judgment, and it cannot prevail. The grammatical and ordinary meaning must be given to the words of a statute: *Grey v. Pearson*, 6 H. L. C. at p. 106; Maxwell on Statutes, pp. 2 and 40. The plaintiff relies upon R. S. O. ch. 44, sec. 30, and contends that her judgment has priority, but the effect of this contention is to enlarge the operation of that enactment. The defendant Abraham could not have made a life charge on his real estate in favour of his wife on the 6th of April, with all the claims of creditors, for whom the assignment was made two days afterwards, existing against his estate.

Osler, Q. C., and *W. M. Douglas*, for the plaintiff. By the registration of her judgment the plaintiff is in a higher position than the ordinary judgment creditor. By

Argument.

virtue of sec. 30 of ch. 44 the registration operates upon the lands and has the same effect as if the defendant had charged his lands with a life annuity in favour of the plaintiff, thus giving her a lien on the land not enforceable by the ordinary *fi. fa.* lands, and not capable of being completely executed by payment, but enforceable by a judicial sale. The plaintiff is not in the position of an ordinary execution creditor, but has a lien prevailing over executions: *Miller v. Miller*, 8 C. L. T. Occ. N. 120; *Cole v. Hall*, 12 P. R. 584, 13 P. R. 100. According to the construction put upon sec. 9 of ch. 124 by the appellant, the effect would be to repeal sec. 30 of ch. 44, but the two clauses stand side by side in the Revised Statutes, and it cannot be said that the one has been repealed as inconsistent with the other: *Arscott v. Lilley*, 11 O. R. 285; 14 A. R. 283. "Judgments" in sec. 9 of ch. 124 does not include a judgment of this kind, but is limited to judgments which are followed by execution. An alimony or annuity decree providing for future payments is not one that can be completely executed by payment, and cannot rank with ordinary judgments.

April 9, 1890. MACMAHON, J.:—

Under the Judicature Act, R. S. O. ch. 44, sec. 30, "An order or judgment for alimony may be registered in any Registry office in Ontario, and the registration shall, so long as the order or judgment registered remains in force, bind the estate and interest of every description which the defendant has in any lands in the county or counties where the registration is made, and operate thereon in the same manner and with the same effect as the registration of a charge by the defendant of a life annuity on his lands."

By the Act respecting Assignments of Insolvents, R. S. O. ch. 124, sec. 9, "An assignment for the general benefit of creditors under this Act shall take precedence of all judgments and of all executions not completely executed by payment, subject to the lien, if any, of an execution

creditor for his costs, where there is but one execution in the sheriff's hands, or to the lien, if any, of the creditor for his costs who has the first execution in the sheriff's hands."

Judgment.

MacMahon,
J.

These two sections must be read together in order to obtain a proper conception of what were the objects sought to be accomplished by the Legislature in passing the several enactments.

An annuity although personal property is "frequently ranged under incorporeal hereditaments, issuing out of land, and even the legislature treats it sometimes as a rent-charge, from which it materially differs.—3 and 4 Wm. IV. ch. 27, sec. 21. The words 'annuity,' and 'rent-charge' are frequently used as convertible terms": Wharton's Law Lexicon, 7th ed., p. 49.

In the case of an annuity granted by way of rent-charge it may be limited so as to charge both the land and the person of the grantor, or the land only, and the annuitant may proceed at his option against the land or the person chargeable: *Turner v. Turner*, Amb. 782.

Where an annuity is made a charge upon lands, or what is the same thing, where the annuity issues out of land, and there is no power of distress given by the deed creating the annuity, a power of distress exists in the annuitant by virtue of 4 George II. ch. 42, sec. 5, such power being, as said by Malins, V. C., in *Sollory v. Leaver*, L. R. 9 Eq. at p. 25, "superadded by the statute."

The most common form in which annuities are created in this country is where the owner of land in fee conveys to his son and then takes from the grantee an annuity bond which is registered against and forms a charge upon the lands conveyed.

Even before the passing of the 18 & 19 Vic. ch. 15 in England, which required an annuity or rent-charge granted otherwise than by marriage settlement or given by will, to be registered in order to protect the lands against purchasers, mortgagees, or creditors, it was held that where lands were charged with the payment of annuities those

Judgment.
MacMahon,
J.

lands would be liable in the hands of a purchaser, because it was the very purpose of making the lands a fund for that payment, that it should be a constant and subsisting fund: Sugden, V. and P., 14th ed., 660; Dart. V. and P., 6th ed., 691; *Elliot v. Merryman*, Barn C. 82; *Wynn v. Williams*, 5 Ves. 130.

An annuity charged on real estate is liable to the judgments against the annuitant: *Younghusband v. Gisborne*, 1 De G. & Sm. 209; and see the judgment of Esten, V.C., in *Bank of British North America v. Matthews*, 8 Gr., at p. 490, where he points out that should the annuitant become bankrupt or insolvent, his whole interest will pass to his assignees, notwithstanding a declaration that it shall not be liable to his debts and engagements, and that it shall not be anticipated.

The precedence given to an assignment for the general benefit of creditors by R. S. O. ch. 124, sec. 9, over "all judgments and all executions not completely executed by payment" does not, I consider, apply to a judgment for alimony under R. S. O. ch. 44, sec. 30. Under the latter Act the judgment, when registered, is to have the same effect as if the owner of the real estate (the defendant in the alimony proceedings) had created a life annuity on his lands by deed duly registered, that is, although a judgment in form, it is for the purpose of creating a lien or charge in favour of a wife entitled to alimony to be considered in effect as a charge by deed of a life annuity on his land, and so necessarily with all the incidents in favour of such a charge.

If that is to be regarded as the effect of such a judgment, then the defendant Thomas Abraham could not convey the lands against which it was registered, unless subject to the charge so created. The title or interest he could convey to a purchaser is the same title or interest which would pass to his assignee by virtue of an assignment under the Act.

The evident design of the Legislature in passing sec. 9 of ch. 124, R. S. O., was to place all ordinary claims or debts

owing by the insolvent, even although such debts were evidenced by judgment, or had passed into execution against the insolvent debtor's goods and lands, upon the same footing, so that there should be a distribution of his estate *pari passu* amongst his creditors when he had made an assignment under the Act, such assignment taking precedence over such judgments and executions.

Judgment.
MacMahon,
J.

Alimony is not an ordinary debt, and under the English Bankruptcy Act it is not the subject of proof on the bankruptcy of the husband, because the amount may be increased or diminished according to the varying circumstances of the insolvent. He is, notwithstanding his bankruptcy, liable to continue the payments: *Linton v. Linton*, 15 Q. B. D. 239. Our Legislature, by sec. 30 of R. S. O. ch. 44, have not regarded an alimony judgment as an ordinary debt, but have by that enactment created the judgment, when registered, a charge upon the land for the payment of the alimony, the same as if it had been a life annuity which the husband had charged upon his land.

I therefore hold that the assignment from the defendant Thomas Abraham to the defendant Hossie does not take precedence of the plaintiff's judgment, and that the plaintiff is not obliged to rank with the other creditors of Thomas Abraham.

The appeal must be dismissed on that ground.

I do not think, from the evidence, that the allowance of \$150 per annum made by the local Master for alimony is at all excessive.

It is clear that the judgment of the plaintiff against the defendant Thomas Abraham is binding upon the defendant John Hossie as assignee of the estate of Thomas Abraham, and he (the defendant Hossie) took such estate subject to the charge created by the judgment, because it was the evident intention of the Legislature to make the lands a fund for the payment of the alimony under the judgment, and that such fund "should be a constant and subsisting fund."

Judgment.
MacMahon,
J.

The priority of the plaintiff's judgment is declared by the Act R. S. O. ch. 44, sec. 30, and the question as to the priority as between the plaintiff and the defendant Hossie has been sufficiently dealt with by the report of the learned local Master.

If the defendant Hossie, as the assignee of Thomas Abraham's estate, is dealing with it, then the direction that Hossie, as assignee, should pay the alimony declared to be due by his assignor is, I consider, a proper direction.

The appeal must be dismissed on all the grounds with costs.

[COMMON PLEAS DIVISION.]

THE SCOTTISH AMERICAN INVESTMENT COMPANY V.
TENNANT.*Mortgages—Right to consolidate.*

The plaintiffs who were the mortgagees under three mortgages from the same mortgagors on different lands, were held entitled only to consolidate in respect of the mortgages in default when action brought to enforce them, and as the amount due on one of the mortgages had been then paid, and there was then no default as to it, the right to consolidate it was refused.

THIS was an action on three mortgages made by Messrs. *Statement.* Christie, Kerr & Co., in favour of the plaintiffs over the following lots; the first mortgage being over lots 2 and 3 in the 5th con. of the township of Matchedash; the second over lot 23 in the 4th con. of North Orillia; and the third over lot 1, 4th con. of Matchedash. The mortgages were given for balance of purchase money.

All the mortgages being in arrear on the 11th of December, 1888, Messrs. Christie, Kerr & Co. arranged with the plaintiffs' solicitors to give them four notes for the payments that were in arrear. On the 15th of February, 1889, two of these notes having at that time been paid, and one of the notes having been dishonoured, Mr. Christie handed Messrs. Gordon & Sampson, the plaintiffs' solicitors, a cheque for \$267.50, which paid up in full the amount due on the mortgage over lot 23 in the 4th con. of North Orillia, and demanded a discharge for the same. The plaintiffs credited this payment on the mortgage over lot 23 in the 4th con. of North Orillia, but refused to give a discharge, asserting that they had a right to consolidate the mortgages that were in arrear on the other lots with the mortgage on this lot, and that Messrs. Christie, Kerr & Co. were not entitled to redeem or get a discharge of the mortgage over lot 23 in the 4th con. of North Orillia, until all the arrears were paid up on the other lots. Messrs. Christie, Kerr & Co. having requested the plaintiffs to

Statement. again renew the note that had fallen due for a portion of the payment in arrear on the mortgage over lots 2 and 3 in the 5th con. of Matchedash, and at the same time having again demanded a discharge of the mortgage over lot 23 in the 4th con. of North Orillia, the plaintiffs' solicitors wrote Messrs. Christie & Co. the following letter :

“TORONTO, 22nd February 1889.

Messrs. Christie, Kerr & Co.

DEAR SIRS :

We now enclose you renewal for two months of your note for \$447.50 and interest due the 14th inst. Kindly have same signed and endorsed and return to us and we will then send you the old note. We cannot discharge the mortgage over lot 23 in the 4th con. of North Orillia until the arrears have been paid up over lot 1, con. 4, Matchedash.

Yours,

GORDON & SAMPSON.”

It appeared that the plaintiff's solicitors intended to refer to the arrears over lot 2 and 3, con. 5, Matchedash, as at that time there were no arrears over lot 1, con. 4.

Subsequently Messrs. Christie, Kerr & Co. became insolvent, and the defendant Tennant was appointed their assignee. Other payments then fell due on lot 1, in the 4th con. of Matchedash, so that both that mortgage and also the one over lots 2 and 3 in the 5th con. of Matchedash were considerably in arrear, and the plaintiffs sought to consolidate these mortgages with the mortgage over lot 23 in the 4th con. of North Orillia, which the defendant James Tennant claimed had been paid off.

A motion was made by the plaintiffs to consolidate the three mortgages, and for judgment on the pleadings and evidence taken before the special examiner, for the amount of the mortgages and interest, and for the possession of the said lands.

February 8th, 1890.

Lockhart Gordon, for the plaintiffs. The assignee cannot stand in any better position than Messrs. Christie, Kerr & Co., for he took the estate subject to all the equities that existed against Christie, Kerr & Co., at the time of their

Argument.

assignment. The mortgage over lot 23, in the 4th con. of North Orillia having at one time been in arrear and at the time of the payment on the 15th of February, 1889, the mortgage over lots 2 and 3 in the 5th con. of Matchedash being largely in arrear, Messrs. Christie, Kerr & Co. had no more right to demand a discharge of lot 23 in the 4th con. of North Orillia, than they would have a right to commence an action for redemption of this lot without offering to pay the arrears due on the mortgage over the other lots. The correspondence shows that the three mortgages were to be treated as one, for in a letter written on the 11th December, in which Messrs. Gordon & Sampson acknowledge the receipt of the notes to cover the arrears on the mortgages they stipulate that if any note was unpaid at maturity, all the notes might be handed back and proceedings might be taken on all the mortgages for any overdue payments. By signing the renewal note and thereby procuring an extension of time for the arrears due on one of the others mortgages (which note Messrs. Gordon & Sampson returned in their letter of the 22nd February, in which they state that they would not discharge lot 23 in the 4th con. of North Orillia), Messrs. Christie, Kerr & Co. obtained the extension of time by consenting to their withholding the discharge until these arrears were paid, and as the arrears have never been paid, the plaintiffs are entitled now to proceed against this lot, as well as the others: *Dominion Savings and Investment Society of London v. Kittridge*, 23 Gr. 631; *Brower v. Canadian Permanent Building Association*, 24 Gr. 509; *Johnston v. Reid*, 29 Gr. 293; *Ross v. Stevenson*, 7 P. R. 126; *Merritt v. Stephenson*, 6 Gr. 567, 7 Gr. 22; *Griffith v. Pound*, Weekly Notes, 1889, p. 203.

Urquhart, for the defendant. The evidence shews that the defendant having made this payment of the 15th of February, 1889, specially on account of lot 23 in the 4th con. of North Orillia, and the plaintiffs' solicitors having applied the payment to pay in full the mortgage over that

Argument. lot, they cannot now argue that the mortgage had not been paid off. *Cummins v. Fletcher*, 14 Ch D. 699, 712, decides that a mortgage not in arrear cannot be consolidated with a mortgage in arrear.

Lockhart Gordon, in reply, *Cummins v. Fletcher*, is distinguishable from the present case. The mortgage over lot 23 in the 4th con. of North Orillia having once been in arrear, an arrangement was made on the 11th of December, that if any of the notes then given to cover the arrears of the mortgages were unpaid, proceedings might be taken on all the mortgages. When the mortgage was in arrear, no payment could subsequently be made on it if other mortgages were in arrear which would pay it up in full, and so deprive the plaintiffs of their right to consolidate.

February 22, 1890. MACMAHON, J. :—

The defendant Tennant is the assignee for the benefit of creditors of the estate and effects of the defendants Christie, Kerr & Co., under R. S. O. ch. 124, by virtue of an assignment bearing date the 4th of March, 1889.

The plaintiffs are the mortgagees, under and by virtue of a mortgage from the defendants Christie, Kerr & Co., bearing date the 15th day of December, 1885, of lots 2 and 3 in the 5th con. of the township of Matchedash, for securing payment of \$3,100 and interest.

The plaintiffs are also the mortgagees under a certain other mortgage from Christie, Kerr & Co., dated the 22nd February, 1886, of lot 23 in the 4th con. of North Orillia, securing payment of \$750 and interest.

The plaintiffs are also the mortgagees by virtue of a certain other mortgage from the said Christie, Kerr & Co., dated the 6th December, 1887, of lot No. 1 in the 4th con. of the township of Matchedash, for securing payment of the sum of \$800 and interest.

Under the terms of the mortgage of the 15th December, 1885, an instalment of the principal money, amounting to

\$775, fell due on the 10th December, 1888, which was not paid; and it is alleged in the statement of claim that by the terms of the mortgage the whole balance due as principal money and the interest thereon, became due and payable.

Judgment.
MacMahon,
J.

The sum of \$400 was paid on account of the mortgage, bearing date the 6th December, 1887.

The whole amount claimed to be due on the two mortgages of 15th December, 1885, and 6th December, 1887, is \$1,950 principal, and for interest \$241.86.

On the 15th February, 1889, Christie & Kerr gave to Messrs. Gordon & Sampson, the solicitors for the plaintiffs, a cheque for \$267.50, being the balance of principal and interest due on the mortgage of the 22nd February, 1886, on the face of the cheque being written by the drawers thereof, "Lot 23, 4th con. North Orillia, balance in full," which cheque was endorsed by and paid to Gordon & Sampson. And in their books under the head of that particular mortgage, a number of credits are given, and the various items of interest and other charges in respect of the mortgage, were added to the account and credit given for the above cheque, and the account balanced as to that mortgage.

The plaintiffs by their claim seek to consolidate the said three mortgages, so as to make the whole of the lands available for the payment of the amount now remaining unpaid for principal and interest, so that Tennant as the assignee of Christie, Kerr & Co., of the equity of redemption in the lands, should not be entitled to a discharge of the land covered by the mortgage of February, 1886, unless he redeemed the lands covered by the other mortgages.

It is contended by the defendants that the balance due on the mortgage of February, 1886, having been paid to and accepted by the plaintiffs as applicable to that particular mortgage, that as to the land mentioned in that mortgage, there is nothing to redeem. What the defendants in effect assert is, that the money having been tendered and accepted and applied in payment of that

Judgment. particular security, Christie, Kerr & Co., could have tendered
MacMahon, a discharge of that mortgage, and could require the plain-
J. tiffs to execute the same.

At the time of the payment of the \$267.50, there was an instalment of principal and interest overdue on the mortgage of December, 1885, which still remains unpaid; and it is by reason of the default then existing in the December, 1885, mortgage, that the plaintiffs now claim the right to consolidate the 1886 mortgage; and the question is, whether such right to consolidate now exists, there being at the time the action was brought no default in the mortgage of February, 1886, the amount due on that mortgage having been paid and satisfied.

In *Mills v. Jennings*, 13 Ch. D. 639, the leading case on the question of consolidation, the Court of Appeal in its judgment, at p. 646, states the rule as follows: "The rule as to consolidation of mortgages in its simplest form is this, that where one person has vested in himself by way of mortgage two estates the property of the same mortgagor, one of these cannot be redeemed without the other, and this is so, whether the two mortgages were originally granted to the same mortgagee or, having been originally vested in different persons, have by assignment become vested in the same person. This was on the equitable principle that a Court of Equity would not assist a mortgagor in getting back one of his estates unless he paid all that was due, though secured on a different estate. The mortgagor was coming into a Court of Equity to obtain its assistance in getting back an estate which at law belonged to the mortgagee, and it was held to be inequitable to allow him to get back an estate of more value than the debt charged on it, and to leave the mortgagee with an estate charged with a debt due by the mortgagor, which might be of larger amount than the value of the estate."

That case went to the House of Lords *sub nomine Jennings v. Jordan*, 6 App. Cas. 699; and Lord Chancellor Selborne, at p. 700, said: "Upon this, which was the principal question in the cause," (the right of the mortgagee to

consolidate) "I agree with the Lords Justices. A mortgagee, who holds several distinct mortgages under the same mortgage, redeemable not by express contract, but only by virtue of the right which (in English jurisprudence) is called 'equity of redemption,' may, within certain limits, and against certain persons (entitled to redeem some or all of them) 'consolidate' them, that is, treat them as one, and decline to be redeemed as to any, unless he is redeemed as to all."

Judgment.
MacMahon.
J.

Mr. Urquhart for the defendants, relied on the judgment of Cotton, L. J., in *Cummins v. Fletcher*, 14 Ch. D. 699, at p. 712, where he said :

"In order to enable the mortgagee to bring an action and to consolidate, there must be two debts due, there must be two estates in respect of which there is only an equitable right in the debtor to redeem or claim them back, and that cannot apply to a case where as regards one of the securities, there has been no forfeiture at all, where the debt is not due, and where, as regards that estate and that security—an independent security—steps could not be taken as against the owner of the equity of redemption to bring him into Court and to call upon him to redeem or to be foreclosed."

But in the present case as to the land covered by the security of February, 1886, there is nothing to redeem, and therefore as to it the Court has nothing upon which it can foreclose. As put by James, L. J., in *Cummins v. Fletcher*, at p. 708: "If a man does not want to redeem property A in respect of which he has made default he may be barred as to that. But if he does not require to redeem property B in respect of which he has made no default, he has no occasion to come into the Court of Equity. The Court of Equity has nothing to foreclose him of, and has no right to deprive him of his legal right to redeem at the proper time."

In the case of *Griffith v. Pound*, W. R. (1889), p. 203, had the plaintiffs after giving notice demanding payment of the £14,200 due on the mortgage mentioned in the

Judgment.
MacMahon, J. notice, accepted the sum so demanded, their right to consolidate that with the other mortgages overdue at the time action was brought, would have been gone. So in the case I am considering the acceptance of the amount due on the 1886 mortgage, is the same as if a demand had been made and the amount paid in compliance with the demand.

The result is that the plaintiffs are only entitled to consolidate in respect to the mortgages in default at the time when the action is brought, to enforce the claim. As the mortgage of February, 1886, was not in default when this action was instituted, the right to consolidate could not exist as to that mortgage.

I do not think the plaintiffs should be called upon to pay the defendants' costs in respect of the point decided in favour of the latter as to the consolidation.

In re Watts, Smith v. Watts, 22 Ch. D. 5, at p. 13, Cotton, L. J., says: "All mortgagees, unless they misbehave themselves, have a right to their costs, and it cannot be said that when a mortgagee having such a point as this, (where a mortgagee brings in an account, and under a wrong impression of the law, but *bonâ fide* and honestly makes a claim which he cannot support), requires it to be brought before the Judge personally, he is guilty of anything wrong. He has a right to require that the matter should be decided by the Judge himself, and although he was unsuccessful, he ought not to have been made to pay the costs of going before the Judge and taking his opinion on such a point."

I have examined the cases of *Dominion Savings and Investment Society of London v. Kittridge*, 23 Gr. 631; *Brower v. Canadian Permanent Building Association*, 24 Gr. 509; *Johnston v. Reid*, 29 Gr. 293; *Ross v. Stevenson*, 7 P. R. 126; *Merritt v. Stephenson*, 6 Gr. 567, 7 Gr. 22, cited during the argument; but none of them touch the point required to be decided in this case.

There will be judgment for the plaintiffs for the immediate possession of the lands mentioned in the mortgage of

the 10th of December, 1885, and of the 6th of December, 1887.

Judgment.
MacMahon,
J.

The defendants to have — months in which to redeem.

Reference to Master to ascertain the amount due for principal and interest on the said two mortgages, and payment directed after amount ascertained.

Judgment for the defendants as to lands mentioned in the mortgage of February, 1886.

The plaintiff is entitled to the general costs, except the costs occasioned by the opposition to the consolidation of the 1886 mortgage with the other mortgages.

[CHANCERY DIVISION.]

DUGGAN v. THE LONDON & CANADIAN LOAN AND
AGENCY COMPANY, ET AL.

Shares—Pledge of for loan—Transfers “in trust”—Pledge by transferee for larger loan—Notice of trust—Right to redeem—Measure of value.

Certain shares not numbered or capable of identification, transferable on the books of a company, were transferred by the plaintiff to brokers, “in trust” as security for the payment of a loan. The plaintiff’s transferees afterwards transferred the shares to others as security for other and larger sums due by them than were due by plaintiff to them. Each transfer subsequent to that of the brokers was made “in trust.”

The plaintiff was aware that the brokers were raising money on his shares, but was assured by them that he could redeem his stock on payment of the amount due by him.

The brokers being unable to redeem the shares, in an action by the plaintiff against the last transferees, who had sold them for a large sum after tender by plaintiff of amount due by him, to compel them to account for their value :—

Held, that the form of the transfer to the last holders was sufficient to put them on enquiry, and that they were chargeable with notice of the facts and of the plaintiff’s rights in regard to the shares ; and that he was entitled to the value of the stock after payment of the amount he had borrowed on it from the brokers, and that the value of the shares was to be taken at their highest market value between plaintiff’s tender and the conclusion of the trial herein.

Statement.

This was an action brought by E. H. Duggan against the defendants named in the judgment for the recovery, upon payment of the amount due by plaintiff, of certain shares of stock, which had been transferred to two of the defendants “in trust,” as security for such payment, and which shares had been afterwards transferred by the plaintiff’s transferees to others as security for other and larger amounts due by them than were due by plaintiff to them.

The following facts are taken from the judgment :

ON 27th October, 1881, the plaintiff, being the owner of 160 shares of the stock of the Toronto House Building Association, procured a loan of \$1,500 from the North British Canadian Investment Co., and as security transferred 80 of these shares to the defendants, W. B. Scarth and Robert Cochran, who were the managers of the company. The transfer expressed upon its face that it was “in trust.”

Messrs. Scarth & Cochran, in addition to their business Statement. of managing the North British and Canadian Investment Co., carried on the business of stockbrokers and financial agents.

On 20th February, 1882, the plaintiff embarked in some stock speculations, in the course of which he purchased through Messrs. Scarth & Cochran a large quantity of Hudson's Bay and North West Land Co. stock upon margins, and he transferred to Messrs. Scarth & Cochran on that day the remaining 80 shares of his stock in the Toronto House Building Association to secure them against loss in connection with his stock speculations through them. This transfer was made to "Messrs. Scarth & Cochran, Brokers of Toronto, in trust."

On 23rd February, 1882, they transferred 80 shares of the stock to "John L. Brodie, in trust Cashier," and on 11th July, 1882, they transferred the remaining 80 shares to "John L. Brodie, Cashier in trust." Mr. Brodie was cashier of the Standard Bank, and these transfers were made to him to secure advances made to Scarth & Cochran by that bank.

On 23rd January, 1883, they changed the loan from the Standard Bank to the Merchants' Bank, and at their request the 160 shares were transferred by Mr. Brodie to "William Cook, Manager, in trust," Mr. Cook being at the time manager of the Merchants' Bank in Toronto. The name of the company in which these shares were held was changed at this time from "The Toronto House Building Association" to "The Land Security Company."

On 2nd February, 1883, Scarth & Cochran paid off to the North British & Canadian Investment Co. the loan of \$1,500, which had been effected by the plaintiff in October, 1881, and the stock appears to have been treated as part of the margin they held from the plaintiff, and was never re-assigned to him.

In April, 1883, Scarth & Cochran arranged with the Home Savings & Loan Co., and with the Federal Bank for an advance upon the security of this stock; the Merchants'

Statement.

Bank was paid off, and 45 of the shares held by Mr. Cook for the Merchants' Bank were transferred at their request to "The Home Savings & Loan Co, in trust," and the remaining 115 shares to "H. S. Strathy, Cashier, in trust." Each of these transfers was executed by Mr. Cochran as attorney for Mr. Cook.

On 2nd January, 1885, Mr. Strathy, for the purpose of convenience, transferred to Mr. J. O. Buchanan, manager of the Federal Bank in Toronto, the 115 shares theretofore held by him. This transfer is made by "H. S. Strathy, cashier, in trust," to "J. O. Buchanan, manager, in trust."

On 2nd March, 1886, having in view a pending allotment of new stock in the Land Security Co., the Home Savings & Loan Co. transferred to "J. O. Buchanan, manager, in trust," one share of the 45 shares held by him. In February, 1886, the Land Security Company made an allotment of new shares of the company amongst their then present shareholders, and at the request of the plaintiff, Cochran arranged with the holders of the shares to take up the allotments and pay the call made upon them. In pursuance of this arrangement, the Home Savings & Loan Co. accepted on 17th February, 1886, an allotment of 67 new shares in respect of the 45 shares then held by them, and Mr. Buchanan, as manager, in trust, accepted an allotment of 172 new shares in respect of the 115 shares then held by him.

On 17th December, 1886, at the request of Cochran, the Home Savings & Loan Co., by Robert Cochran, their attorney, transferred to "J. O. Buchanan, manager, in trust," the 44 old and 67 new shares then held by the transferors, whose debt was paid off with money obtained from the Federal Bank. In February, 1887, a further allotment of new shares in the Land Security Co. was made, and "J. O. Buchanan, manager, in trust," received and accepted an allotment of 399 new shares in respect of the 160 old shares then held by him. The calls upon the new stock in each case were added by the holders of it to the debt of Cochran, for which the shares were

pledged. The Federal Bank now held the 160 old shares and 638 new shares in the Land Security Co., all in the name of "J. O. Buchanan, manager, in trust." Statement.

On September 7th, 1887, Cochran paid off the debt for which the stock was held by the Federal Bank, and obtained from Mr. Buchanan a power of attorney to transfer the stock generally. On the same day he negotiated and obtained an advance of \$14,300 from the defendants, the London & Canadian Loan & Agency Co., Limited, and to secure the advance he executed as attorney for "J. O. Buchanan, manager, in trust," a transfer to "James Turnbull, in trust," of the 160 shares old and 638 shares new stock, Mr. Turnbull being the manager of the London & Canadian Loan & Agency Co.

Shortly before the commencement of this action the plaintiff tendered to the defendants, the London & Canadian Loan & Agency Co., Limited, a sum of \$7,500, alleged by him to be a sum sufficient to cover all that Scarth & Cochran could claim from him, and demanded that the stock should be re-transferred to him. They refused, however, to recognize him in the matter, and claimed to hold the stock for the full amount advanced by them to Cochran. Cochran wrote to the plaintiff that he was unable to procure a return of the stock upon payment of Duggan's debt, and the stock was thereupon sold by the London & Canadian Loan & Agency Co. to realize the amount of their claim against Cochran. The sale took place on 9th January, 1888. The 160 shares of old stock realized \$9,670, and the 638 shares of new stock, \$7,711.83—in all, \$17,381.83.

Duggan was aware from the beginning that Messrs. Scarth & Cochran were raising money upon his stock; this was certainly called to his attention in 1886, when the first allotment of new stock was made, but he was assured then by Cochran that his stock was intact and could be redeemed upon payment of the amount due by the plaintiff to Cochran. He was only made aware immediately before his tender to the London & Canadian that it was

Statement. pledged for an amount in excess of what he owed the broker upon it. Long before this time all the stocks in which the plaintiff had been speculating had been disposed of, and the balance due Cochran by him represented the losses upon the speculations and the advances made to take up the new stock in the Land Security Co. Messrs. Searth & Cochran had dissolved partnership in November, 1884, and the business was continued by the defendant Cochran alone. At the time of the dissolution some \$4,100 appears to have been due the firm from the plaintiff, and his stock was pledged for a sum considerably larger.

The action was tried at the Winter Assizes, held in Toronto upon the 4th and 8th days of March, 1890, before STREET, J.

McCarthy, Q.C., and *Moss*, Q.C., for plaintiff.

Arnoldi, Q.C., for the Company.

Cassels, Q.C., for defendant Turnbull.

Ritchie, Q.C., for defendant Searth.

March 20th, 1890. STREET, J. :—

This action is brought against the London & Canadian Loan & Agency Co., Limited, James Turnbull, William B. Searth and Robert Cochran, claiming an account from the defendants of the full value of the shares and discovery of their dealings with them, and a declaration that the defendants, the London & Canadian Loan & Agency Co., Limited, and Turnbull could only lawfully hold the stock for the amount due by the plaintiff to Searth & Cochran.

It appears sufficiently plain from the facts that Searth & Cochran never held these shares as security for any greater sum than that which was due to them from time to time by the plaintiff, and that as between them and the plaintiff, their duty was to return, or procure the return to the plaintiff of the shares upon his paying the amount due them. This, however, they were unable to do, as Mr.

Cochran informed the plaintiff in his letter of 9th December, 1887, because the stock was pledged for a sum largely exceeding the plaintiff's debt to them, and they were unable to raise the difference, and I think, looking at that letter, that a tender to Cochran would have been a useless formality.

Judgment.
Street, J.

The question of the plaintiff's right to follow the stock into the hands of the London & Canadian Loan & Agency Co. and their manager, Mr. Turnbull, is, no doubt, a highly important one, but the principles upon which the right is claimed are familiar ones, and their application to the facts of the present case does not appear attended with special difficulty. The shares in question are by statute transferable upon the books of the company in which they are held. They are, however, within the rule which applies to shares as well as to ordinary goods and chattels that a transferee acquires no better title than that of his transferor, unless the true owner have in some way estopped himself from setting up his title as against the transferee. See remarks of Cotton, L. J., in *Williams v. Colonial Bank*, 38 Ch. D., at p. 399.

Duggan was the true owner of the shares in question, and was undoubtedly entitled to obtain them as between himself and Messrs. Scarth & Cochran upon payment of their advances. His right to obtain them from the transferees, the London & Canadian Co., is disputed upon several grounds which it is necessary to examine.

It is said, in the first place, that the first 80 shares were transferred by Duggan to William B. Scarth and Robert Cochran individually, and that they have made no transfer in their individual names; that as to these 80 shares the plaintiff cannot recover, because they must be taken to be still standing in the names of the original transferees. A transfer was, however, executed during the continuance of the partnership in the name of the firm of 160 shares which Mr. Cochran says were the shares of the plaintiff, to the manager of the Merchant's Bank, and I am bound to assume upon the pleadings and the facts disclosed that

Judgment. this transfer was made with the authority of both partners,
Street, J. and that, therefore, the 80 shares passed as part of the 160.

Then it is contended that it is impossible to shew that the shares transferred by the Federal Bank manager to Mr. Turnbull were the shares of the plaintiff, because in the course of their journey through various holders, between the first transfer by the plaintiff to Scarth & Cochran and their final arrival in the hands of the London & Canadian Co., they had passed through the hands of persons who held large numbers of other shares in the same company which were in no way distinguishable from those in question; and that it would be unjust to impute to the London & Canadian Co. notice of the plaintiff's rights when those rights had become confused with the rights of other holders.

Now it is quite true that these shares were in no way ear-marked or distinguished from other similar shares in the same company. They were not identified by numbers or otherwise, and it is, therefore, alike impossible and unnecessary that the plaintiff should shew that the shares which came to the hands of Mr Turnbull were the identical shares which he had transferred to Messrs. Scarth & Cochran. It is sufficient for him to shew, as he has done, that the shares have been dealt with by the various intermediate holders as being those shares, in order to entitle him to assert as against the last transferee his ownership in them: Lewin on Trusts, Bl. ed., p. 1093 (star page 894); *Pennell v. Deffell*, 4 D. M. & G. 372; *In re Hallett's Estate*, *Knatchbull v. Hallett*, 13 Ch. D. 696, at p. 711.

Granting, however, for the moment, that the London & Canadian Co. might have had some difficulty in tracing these shares back through the various holders to the true owner, the plaintiff, they have left unanswered the further objection that they did not attempt to do so. They held the shares under a transfer expressed on its face to be from "J. O. Buchanan, manager, in trust," executed by Cochran as attorney for him, and accepted by Mr. Turnbull, their manager,

and they were lending money upon the shares to Cochran. They must at least be taken to have known that Mr. Buchanan held the shares as trustee. Here was plain notice that the transferor, Mr. Buchanan, was not the owner of them, and everything to put the London & Canadian Co. upon enquiry as to who was the owner, but they abstained from a single word of enquiry upon the point. Mr. Turnbull, their manager, who negotiated the transaction, was asked at the trial:

“Q. As a fact, you did not know what the trust was?

A. I did not know what the trust was.

Q. You did not inquire of Mr. Cochran how he held?

A. I did not. *I think it would have been an impertinence if I had.*

Q. Then you did not inquire into the title at all?

A. Beyond the fact that we got it.

* * * * *

Q. Now, if you had noticed that this stock had been assigned in trust, that the gentleman who purported to assign it to you described himself as holding it in trust would not you have felt bound to make enquiries as to what that trust was? A. I thought I knew what the trust was.

Q. Answer the question? A. No.”

The witness afterwards explained in re-examination that if he had noticed that the stock stood in the name of Mr. Buchanan, “in trust,” that circumstance would have made no difference in his action, because he would have understood that to mean in trust for the Federal Bank.

Being put upon enquiry by the form of the transfer to them, the London & Canadian Co. must be taken upon all reason and authority to be chargeable with notice of the facts which existed, and which I am bound to assume they would have learned, had they made enquiry either of Mr. Buchanan or Mr. Cochran: *Jones v. Smith*, 1 Ha. at p. 55; *Jones v. Williams*, 24 Beav., at p. 62. They would have been told by the former gentleman that he held the shares for the Federal Bank as security for an advance made to

Judgment.
Street, J.

Judgment.
Street, J.

Cochran, which had just been paid off; they would, I must assume, have ascertained from Mr. Cochran that the shares had been pledged to Scarth and himself as security for advances made to Duggan, and that Duggan was the owner of them, subject to the payment of some \$7,000 or \$7,500. Apart, therefore, from the supposed difficulty of tracing the shares back to the plaintiff, the London & Canadian Co. seem clearly chargeable with notice of the plaintiff's rights in regard to the shares which were transferred to them.

The London & Canadian Co. further contended, upon the argument, that they were entitled to be treated as assignees of the debt for which the Federal Bank held the shares. This position is not raised upon the pleadings, nor was attention directed to it at the trial. The pleadings treat the advance as having been made directly to Cochran, and do not set up the rights of the Federal Bank as a bar. The evidence at the trial does not connect the money of these defendants with the payment of the debt of the Federal Bank beyond the fact that the advance to Cochran was made apparently on the same day that he paid the debt to the Federal Bank. It would rather appear that the Bank was paid before the Loan Co. actually made any advance. It may, perhaps, be well, however, now to consider the grounds upon which the argument rests.

On 11th April, 1883, Scarth & Cochran borrowed from the Federal Bank \$13,450 upon the security of the plaintiff's stock and other stocks belonging to their customers. At this time the plaintiff owed them some \$45,000 for the purchase money of the speculative stocks which they had purchased for him. Against this they or their English agents held these stocks, and in addition Scarth & Cochran held the 160 shares of Land Security Co. stock and other stocks as a margin. At the end of 1885 all the speculative stocks had been sold and the proceeds placed to plaintiff's credit by Cochran leaving a balance due by plaintiff of between \$3,000 and \$4,000, and there was due the Federal Bank by Cochran some \$8,300, for which they held the plaintiff's stock.

The contention of the defendants, the London & Canadian Co., is that Scarth & Cochran must be taken to have had from Duggan authority to pledge the stock held as margin to the extent of the balance due them by him, and that therefore they had his authority to pledge the stock to the Federal Bank for the full amount for which they did pledge it; that the pledge to the Federal Bank was lawfully made with Duggan's authority for the full amount of \$13,450 in the first place, and that although Scarth & Cochran should have applied the proceeds of the sales of the speculative stocks in reducing this debt, the right of the Bank to hold the stocks for the whole debt was not affected by Scarth & Cochran's failure to do so; that the Bank had, therefore, always the right to hold a lien on the stock against the plaintiff for the amount due them, which, as above stated, was reduced in 1885 to \$8,300, but was afterwards increased by the amount they advanced to take up the new stock, and that the defendants, as equitable assignees of the rights of the Bank, are entitled to hold the stock for this \$8,300, and for the later advances upon the new stock less any payments since made by Cochran to the Bank in reduction of the amount. No application was made to amend the pleadings, and I think it was too late after the evidence had all been taken to raise such a question, putting, as it does, the case of the Loan Co. upon such an entirely new basis, unless the evidence shewed the strongest and firmest foundation for it. To come to a decision upon it I should have to go into the whole account between the Federal Bank and Scarth & Cochran, and to ascertain whether the Federal Bank were chargeable with notice from time to time of the plaintiff's rights. I must, therefore, refuse to give effect to this contention.

I can find no evidence upon which I can hold that the plaintiff has estopped himself from claiming his rights. In his transfers to Scarth & Cochran he transferred to them "in trust," thus giving notice to all subsequent transferees from them that their interest was not an absolute one:

Judgment.
Street, J.

Judgment. *Bank of Montreal v. Sweeny*, 12 App. Cas. 617; *Muir v. Carter*, 16 S.C.R. 473. He is not shewn to have been aware until immediately before he gave notice to the defendants, the Loan Co., that his stock had been improperly dealt with by Scarth & Cochran, or either of them, and the mere fact that he knew they had pledged it, when coupled with Cochran's statement to him that it was intact, was not one which required action on his part.

On the part of Scarth it was urged that he should not be held liable for the acts done by Cochran after the dissolution of the partnership; that the loan effected upon this stock whilst he was a partner with Cochran was no greater than was justified by the state of the account between the plaintiff and his firm, and that with regard to the new stock, at all events, he is not in any way answerable for it.

Scarth & Cochran became trustees of the 160 shares, and their duty was to restore them to the plaintiff upon payment of their lien. Scarth had nothing to do with the new stock, and was never a trustee of it; his liability must, therefore, be limited to the value of the 160 shares of old stock, and against this he is entitled to credit for so much of the balance due by Duggan now remaining as represents the balance of the debt due by him to Scarth & Cochran as a firm at the time of their dissolution.

The plaintiff is entitled, therefore, to recover from all the defendants, including Scarth, the value of the 160 shares, less this balance of Scarth & Cochran's claim as a firm against Duggan; and, in addition, to recover from the defendants, other than Scarth, the value of the 638 new shares, less the balance due by the plaintiff to Cochran upon the dealings subsequent to the dissolution of the firm of Scarth & Cochran. The value of the shares in each case is to be taken at their highest market value between the date of the plaintiff's tender to the Loan Co. and the 8th March, 1890, which was the day upon which the trial was concluded: *Bank of Montgomery v. Reese*, 26 Penn. St. Rep. 143, and cases there cited.

There should be a reference as agreed on by the parties to ascertain the value of the shares and to take the necessary accounts, and the plaintiffs should have their costs against all the defendants.

Judgment.
Street, J.

G. A. B

[CHANCERY DIVISION.]

RE INGOLSBY.

Devolution of Estates Act—R. S. O. ch. 108, sec. 4, sub-sec. 2—Election by will—Time of will taking effect.

An election by a widow to take her distributive share in lieu of her dower under sec. 4, sub-sec. 2 of "The Devolution of Estates Act," may be made by will, which as to such election speaks from the time of its execution, and not from the time of her death.

THIS was an application in Chambers under Consolidated Statement. Rule 1006 for the opinion of the Court as to the validity of an election made in a will by the widow of an intestate under the "Devolution of Estates Act."

The matter came up on March 17, 1890, before ROBERTSON, J.

McKechnie, for the executor of the deceased widow.

J. Hoskin, Q.C., for the infants.

The facts are sufficiently stated in the judgment.

April, 29, 1890. ROBERTSON, J. :—

On or about 15th June, A.D. 1889, Bernard Ingolsby died intestate, having left him surviving his widow, Bridget, and one or more infant children, and seized in fee or otherwise beneficially entitled to certain lands in the county of

Judgment. Peel. Afterwards, on or about the 31st day of August, in the same year, the widow also departed this life, having first made and published her last will and testament, bearing date the 28th day of August, 1889, the said will having been duly executed according to law.

Robertson, J.

Up to this date the widow had not elected to take her interest, under section 4 of "The Devolution of Estates Act," (R. S. O. ch. 108) in her husband's undisposed of real estate, in lieu of dower, but in her said will is the following paragraph: "I elect to take a distributive share of my deceased husband's real estate in lieu of dower therein."

Letters of administration to the estate of Bernard Ingolsby have been granted by the proper Surrogate Court to Thomas Ingolsby, a brother of the intestate, since the decease of the widow—and probate has also been granted to the executor named in the will of the testatrix, the widow.

The question now is whether the election expressed in and by the will of the widow, is a good election, under the said 4th section of "The Devolution of Estates Act," subsec. 2.

The 26th section of "The Wills Act of Ontario," declares that "Every will shall be construed, *with reference to the real and personal estate comprised in it*, to speak and to take effect, as if it had been executed immediately before the death of the testator, unless a contrary intention appears by the will."

This will contains not only a devise and bequest, but also a declaration; the former is in relation to real and personal estate of which the testatrix died seized, in regard to which it is clear, that the will must be construed to speak as if it had been executed immediately before the death. As regards the declaration however, I am of opinion that it must be held to have taken effect and to have become operative, immediately upon the execution.

There is no doubt that for some purposes the date of the will can be looked to for the purpose of ascertaining, for instance, the intention of the testatrix; and that being the case, it is clear that three days before the death of the

testatrix, she intended to elect to take a distributive share Judgment.
in the real estate of her deceased husband, and as the will Robertson, J.
was duly executed as a will, it follows that it must be
construed as an instrument within the said fourth section,
duly executed according to the requirements of that section.

I am therefore of opinion that the election thus made by
the widow was a good election, and that she became enti-
tled under the "Devolution of Estates Act," to all the bene-
fits arising thereunder.

Costs of all parties to be paid out of the estate of Bridget
Ingolsby.

G. A. B.

[QUEEN'S BENCH DIVISION.]

STRETTON V. HOLMES ET AL.

Negligence—Mistake in compounding medicine—Physician—Druggist—Costs.

A physician wrote a prescription for the plaintiff and directed that it should be charged to him by the druggist who compounded it, which was done. His fee, including the charge for making up the prescription, was paid by the plaintiff. The druggist's clerk by mistake put prussic acid in the mixture, and the plaintiff in consequence suffered injury.

Held, that the druggist was liable to the plaintiff for negligence, but the physician was not.

Under the circumstances of the case no costs were awarded to or against any of the parties.

Statement.

THIS was an action for damages for negligence, tried before ROSE, J., and a jury at Goderich, on the 25th October, 1889.

The defendant Thomas G. Holmes was a physician, and the defendant George A. Deadman was a druggist. The plaintiff being ill, her husband went for the defendant Dr. Holmes, who came and prescribed for her. One of the ingredients was hydrochloric acid. The husband took the prescription to the defendant Deadman's drug store. On it was written "Charge to T. G. H.," by which was meant that the druggist should charge the mixture to the doctor, which was done. The doctor charged his fee and was paid by the husband. This fee included the charge for the mixture.

In compounding the mixture the druggist's clerk by mistake put in hydrocyanic (prussic) acid instead of hydrochloric acid. The husband administered a dose to the plaintiff, who suffered somewhat severely from either fright or the effects of the poison.

The action was brought against both the doctor and the druggist. The charge in the statement of claim was "that the defendants in giving and preparing said prescription and in compounding said poisonous, deleterious, and noxious mixture for the plaintiff, and in administering the same or causing the same to be administered to the plaintiff, did

not exercise reasonable and proper care, and the plaintiff ^{Statement.} further charges and the fact is that in their treatment of the plaintiff in this particular matter the defendants were guilty of gross negligence and want of professional care and skill."

The only questions which it was thought necessary to leave to the jury were: (1st) whether the plaintiff suffered injury from the administration of the hydrocyanic acid; (2nd) if so, whether or not the effect was merely temporary; and (3rd) as to damages.

The jury found that the plaintiff did suffer injury; that the effect was merely temporary; and they assessed the damages at \$100.

The argument was heard at Toronto on the 11th December, 1889.

A. M. Taylor, for the plaintiff. There should be judgment against both defendants. I refer to *Thomas v. Winchester*, N. Y. Court of Appeals, July, 1882, reported in Bigelow's Leading Cases on the Law of Torts, p. 602. The defendant Holmes is liable for breach of contract. The plaintiff paid him for medicine, and was entitled to receive good medicine.

Garrow, Q.C., for the defendants, referred to *Longmeid v. Holliday*, 6 Ex. 761; *Gladwell v. Steggall*, 8 Scott 60; 5 Bing. N. C. 733; *Butler v. Hunter*, 7 H. & N. 826; *Gillson v. North Grey R. W. Co.*, 35 U. C. R. 475; *Wheelhouse v. Darch*, 28 C. P. 269; *Bower v. Peate*, 1 Q. B. D. 321; *Murphey v. Caralli*, 3 H. & C. 462; *Heaven v. Pender*, 11 Q. B. D. 503, 507.

April 23, 1890. ROSE, J.:— (After stating the facts as above).

It is clear that the defendant Holmes was not guilty of any negligence in giving or preparing the prescription, and had nothing to do with the preparation or administration of the mixture, nor was any negligence in treatment shewn.

Judgment.

ROSE, J.

The druggist personally was not guilty of any negligence—the error was his clerk’s—and had nothing to do with preparing the prescription, administering the medicine, or the subsequent treatment. In no sense was there joint negligence.

I do not see how the plaintiff can succeed against the defendant Holmes for negligence. He was guilty of none. His prescription was properly prepared and every act of his was with due care. He was no more guilty of negligence than if he had gone to the drug store and purchased for the plaintiff a bottle of any prepared mixture which to all appearance was properly prepared. See *Longmeid v. Holliday*, 6 Ex. 761, referred to in *Heaven v. Pender*, 11 Q. B. D. 503.

But I think it is clear that the defendant Deadman is liable. The case of *George and wife v. Skivington*, L. R. 5 Ex. 1, is directly in point. Here, as there, the person for whom the mixture was required was known—for the prescription had written upon its face “Mrs. John Stretton.” That case also is referred to in *Heaven v. Pender*.

See also *Pippin v. Sheppard*, 11 Price 400, and *Gladwell v. Steggall*, 8 Scott 60; 5 Bing. N. C. 733, referred to in *Longmeid v. Holliday*.

The result is that the plaintiff is entitled to enter judgment against the defendant Deadman for the \$100, and the action must be dismissed as against the defendant Holmes.

As to costs, I do not feel inclined to certify to entitle the plaintiff to full costs. On the finding of the jury the plaintiff made a claim which was excessive and open to observation. She may have honestly believed that all she suffered, or thought she suffered, was from taking the mixture in question, but the jury’s finding is substantially a finding that the effect of the poison was merely temporary and passed away in a few hours.

While as a matter of law the druggist is liable, it is for no personal act, and a claim of \$10,000 was so excessive

that the award of \$100 is a substantial failure on the plaintiff's part.

Judgment.

ROSE, J.

Mr. Garrow said that his clients were willing, in the event of either being found liable, to have judgment entered against such defendant without costs rather than to have judgment against one with costs, and in favour of the other with costs. And as, if I do not certify, there would in one event be the further complication of setting off costs, I think perhaps the fairest course will be to act on Mr. Garrow's suggestion and direct judgment to be entered for plaintiff for \$100 without costs against the defendant Deadman, and for the defendant Holmes dismissing the action without costs.

[QUEEN'S BENCH DIVISION.]

GIBBONS V. McDONALD ET AL.

Bankruptcy and insolvency—Insolvent debtor—Mortgage to creditor—Preference—Notice or knowledge of insolvency—R. S. O. ch. 124, sec. 2.

A farmer mortgaged his farm to secure a debt due by him to the mortgagee and a small sum advanced at the time the mortgage was made. He knew at the time he made the mortgage that he was unable to pay his debts in full, and that he was giving the mortgagee a preference over his other creditors. The practical effect was that the mortgagee was paid in full and that the rest of the creditors received nothing. The mortgagee, however, was not aware at the time he took the mortgage that the mortgagor was in insolvent circumstances.

Held, following *Johnson v. Hope*, 17 A. R. 10, that the mortgage was not void against creditors, under sec. 2 of R. S. O. ch. 124.

Statement.]

THIS was an action tried before STREET, J., without a jury, at the Goderich Assizes, on April 1, 1890.

The plaintiff was the assignee under R. S. O. ch. 124 of Andrew Morrison, a farmer, under an assignment for the benefit of creditors dated December 12, 1889, and the action was brought by him to set aside as a preference a mortgage for \$600 made by Andrew Morrison to the defendant McDonald, on November 9, 1889, upon the farm of the mortgagor. The mortgage had been assigned before action by McDonald to the defendant Heffernan, and the plaintiff at the trial asked leave to claim from McDonald the proceeds of the sale of the mortgage in case it should be held to be a sale which could not be impeached.

The case was argued at the conclusion of the evidence.

Garrow, Q.C., for the plaintiff. The recent case of *Johnson v. Hope*, 17 A. R. 10, does not apply to a case like this, where a mortgage is given to a creditor, but only to the case of an advance by a lender upon the security of a mortgage. This is clearly a fraudulent preference: *River Stave Co. v. Sill*, 12 O. R. 557; *Molson's Bank v. Halter*, 16 A. R. 323; *Rae v. McDonald*, 13 O. R. 352. As to the

position of Heffernan, *Elliott v. McConnell*, 21 Gr. 276, Argument. and *Totten v. Douglas*, 18 Gr. 341, shew that the purchaser of a mortgage takes subject to all the equities. I also refer on this point to *Ryckman v. Canada Life Assurance Co.*, 17 Gr. 550; *Wilson v. Kyle*, 28 Gr. 104; Coote on Mortgages, 4th ed., p. 659; *Parker v. Clarke*, 30 Beav. 54; *Ogilvie v. Jeaffreson*, 2 Giff. 353, to be distinguished from *George v. Milbanke*, 9 Ves. 190.

M. C. Cameron, for the defendant McDonald. My client is not a proper party, having parted with the mortgage. There can be no judgment against him except upon terms of his being restored to his rights. But at any rate the mortgage is not void against him: *Rae v. McDonald*, 13 O. R. 352; *Kennedy v. Freeman*, 15 A. R. 216, remarks of BURTON, J. A., at pp. 222 *et seq.*; *Johnson v. Hope*, 17 A. R. 10.

Mabee, for the defendant Heffernan. Neither McDonald nor Heffernan had notice of the insolvency of Morrison, and the mortgage is not void: *Johnson v. Hope*, 17 A. R. 10; *Lamb v. Young*, 19 O. R. 104; *Burns v. McKay*, 10 O. R. 167; *Lancey v. Merchants Bank*, *ib.* 169. Heffernan, at all events, is a purchaser of the mortgage for value without notice, and the mortgage is not void as against him: R. S. O. ch. 102, sec. 32; *Wright v. Leys*, 8 O. R. 88; *Davis v. Hawke*, 4 Gr. 394; *Judd v. Green*, 45 L. J. Ch. 108; 33 L. T. N. S. 597; *Nant-y-Glo v. Tamplin*, 35 L. T. N. S. 125. If the mortgage is declared void, Heffernan is entitled to relief over against McDonald for the mortgage money and costs between solicitor and client: *Powell v. Baker*, 13 C. P. 194; *Real Estate Investment Co. v. Metropolitan Building Society*, 3 O. R. 476; *Hutton v. Wanzer*, 11 P. R. 302.

May 1, 1890. STREET, J.:—

At the time the mortgage was given the mortgagor owned the following property:

Judgment.	The farm in question, the extreme cash value of	
Street, J.	which certainly did not exceed	\$6500 00
	Subject to a mortgage for \$5000 and interest	.. 5150 00
		<hr/>
		\$1350 00
	Chattel property worth about	550 00
		<hr/>
		\$1900 00
	Less the value of his wife's dower in the land.	
	And he owed debts to the amount of about 4100 00
		<hr/>
	Leaving a clear deficiency of	\$2200 00

I arrive at the amount of the debts by taking their amount at the time of the assignment, viz. : \$2960, besides the debt of \$571.50 to McDonald, and adding to this the debts which Morrison swore he paid off before the assignment out of the proceeds of the \$550 worth of chattel property, between the making of the mortgage and the date of the assignment.

The mortgage was given to secure a debt of \$571.50 due by the mortgagor to the mortgagee, and the sum of \$28.50 advanced at the time the mortgage was made.

It is clear from the evidence of the mortgagor that he knew when he made the mortgage that he was unable to pay his debts in full, and the circumstances are such that he cannot have been ignorant of the fact that by making the mortgage he was giving McDonald a preference over his other creditors.

It is equally clear that the necessary effect of the making of the mortgage has been to give to this creditor McDonald a preference over the other creditors of the mortgagor; the assignee has only the equity of redemption in the land subject to the two mortgages—an asset which is not worth more than \$750—with which to pay debts amounting to \$2960. The practical effect will be that McDonald will probably be paid in full, and that the rest of the creditors will receive nothing.

There is, however, upon the evidence nothing to shew that McDonald was aware at the time he took the mortgage

that Morrison was in insolvent circumstances; his credit up to this time had been perfectly good; and McDonald swears that he was not aware of his circumstances, and had no reason whatever to doubt his solvency.

Judgment.
Street, J.

Under these circumstances, were I to follow the view which I confess I have hitherto entertained of the meaning of sec. 2 of ch. 124, R. S. O.,* I should hold the mortgage to be void as being a transfer having the effect of giving to McDonald a preference over the other creditors of the mortgagor. I conceive, however, that I am bound to decide otherwise by reason of the construction placed upon this and the 3rd sec. of the Act by the unanimous judgment of the Court of Appeal in the late case of *Johnson v. Hope*, 17 A. R. 10. I might without difficulty distinguish between the facts in that case and those in the present case, but the principle is too broadly and clearly laid down to justify me in treating it as being inapplicable to the facts of the present case; that principle being, as I understand it, that unless notice of the insolvency of the transferor is brought home to the transferee, the transfer is not avoided even though its effect may be to give one creditor a preference over the others. I have no course open, therefore, in the present case but to order that the action be dismissed with costs.

* 2. Every gift, conveyance, assignment, or transfer, delivery over or payment of goods, chattels, or effects, or of bills, bonds, notes, securities, or of shares, dividends, premiums, or bonus in any bank, company, or corporation, or of any other property, real or personal, made by a person at a time when he is in insolvent circumstances, or is unable to pay his debts in full, or knows that he is on the eve of insolvency, with intent to defeat, delay, or prejudice his creditors, or to give to any one or more of them a preference over his other creditors, or over any one or more of them, or which has such effect, shall, as against them, be utterly void.

[QUEEN'S BENCH DIVISION.]

ROSE V. TOWNSHIP OF WEST WAWANOSH ET AL.

Municipal corporations—By-law authorizing taking of gravel without specifying lands—Illegality—R. S. O. ch. 184, sec. 550, sub-sec. 8; sec. 338—Injunction without quashing by-law.

By sec. 550, sub-sec. 8, of R. S. O. ch. 184, the council of every township is authorized to pass by-laws for searching for and taking such timber, gravel, stone, or other material or materials as may be necessary for keeping in repair any road or highway within the municipality :—

Held, that the meaning of this section is that the council may, as necessity arises for their doing so, exercise the right to take gravel, &c., from any particular parcel or parcels of land, having first declared the necessity to exist and chosen and described the land from which the material is to be taken, by a by-law ; and therefore a by-law, purporting to be passed under this section, which authorized and empowered the path-masters and other employees of the corporation to enter upon any land within the municipality when necessary to do so, save and except orchards, gardens, and pleasure-grounds, and search for and take any timber, gravel, &c., was upon its face illegal, because it purported to confer upon its officers wider and more extensive powers than the statute authorized :—

Held, also, notwithstanding the provisions of sec. 338 of R. S. O. ch. 184, that the plaintiff was entitled without quashing the by-law to an injunction to restrain the defendants from proceeding to enforce the rights they claimed under this by-law, by entering upon his lands.

Statement.

THIS action was tried before STREET, J., without a jury, at the Goderich Assizes on 1st April, 1890.

The plaintiff claimed to be owner of the lands in question under the will of his father subject to the life estate of his mother, Isabella Rose. The action was brought against the corporation of the township of West Wawanosh, and certain persons acting under their authority, to restrain them from removing gravel from the land in question. The defendants claimed the right to take the gravel under a by-law of the corporation, of which the following is a copy :

“ MUNICIPALITY OF WEST WAWANOSH.

By-law No. 3, 1889.

Whereas power is given by the R. S. O. 1887 ch. 184, sec. 550, sub-sec. 8, to township councils to pass by-laws for searching for and taking such timber, gravel, stone, or other material or materials as may be necessary for mak-

ing and keeping in repair any road or highway belonging to or within the municipality. Be it therefore enacted by the council of the corporation of West Wawanosh, and the same is hereby enacted, that the pathmasters and other employees of the corporation of the said township of West Wawanosh be and are hereby authorized and empowered to enter upon any land within the municipality when necessary to do so, save and except orchards, gardens, and pleasure grounds, and search for and take any timber, gravel, stone, or other materials necessary for making and keeping in repair any road or highway in the township of West Wawanosh; and the right to enter upon such land as well as the price or damage to be paid to any person for such timber or materials shall, if not agreed upon by the parties concerned, be settled by arbitration under the provisions of this Act. Passed this 11th June, 1889." Statement.

This by-law had not been quashed.

R. S. O. ch. 184, sec. 550—The council of every county, township, city, town, and incorporated village may pass by-laws. * * * 8. For searching for and taking such timber, gravel, stone, or other material or materials (within the municipality) as may be necessary for keeping in repair any road or highway within the municipality; and, for the purpose aforesaid, with the consent of the council of an adjoining municipality (by resolution expressed) for searching for and taking gravel within the limits of such adjoining municipality, and the right of entry upon such lands, as well as the price or damage to be paid to any person for such timber or materials shall, if not agreed upon by the parties concerned, be settled by arbitration under the provisions of this Act.

(a) But no such gravel shall be taken or removed from the premises of any person in an adjoining municipality until the price or damage has been agreed upon between the parties or settled by arbitration.

The case was argued at the conclusion of the evidence.

Argument. *Garrow*, Q.C., for the plaintiff. The by-law is clearly bad: *In re Ingersoll and Carroll*, 1 O. R. 488. Where the by-law is not within the competence of the council the plaintiff may maintain an action without having it quashed: *Connor v. Middagh*, 16 A. R. 356. It is not necessary to quash a by-law to get an injunction, nor even to recover damages in every case. Here there is no by-law applicable.

M. C. Cameron, for the defendants. Sec. 550, sub-sec. 8, of the Municipal Act gives the power which was here exercised. I refer to *Stonehouse v. Enniskillen*, 32 U. C. R. 562; *Harding v. Cardiff*, 29 Gr. 308; 2 O. R. 329. Compensation under the Act is the plaintiff's remedy, and where there is a remedy of that kind an action will not lie: *Pratt v. Stratford*, 14 O. R. 260; 16 A. R. 5; *Adams v. Toronto*, 12 O. R. 243; *Canadian Land, etc., Co. v. Dysart*, 9 O. R. 495; 12 A. R. 80. The by-law, not having been quashed, the Court will not interfere by injunction: *Carroll v. Perth*, 10 Gr. 64; *Grier v. St. Vincent*, 12 Gr. 330; 13 Gr. 512; *Vandecar v. East Oxford*, 3 A. R. 131. Sec. 338 of the Municipal Act, R. S. O. ch. 184, shews that no action can be brought till after the by-law has been quashed, and also that one month's notice of action is necessary. I refer to *Smith v. Toronto*, 11 C. P. 200; *Black v. White*, 18 U. C. R. 362; *Wilson v. Middlesex*, 18 U. C. R. 348; *Barclay v. Darlington*, 5 C. P. 432; *Carmichael v. Slater*, 9 C. P. 423; *Haynes v. Copeland*, 18 C. P. 150; *Malott v. Mersea*, 9 O. R. 611; *Dennis v. Hughes*, 8 U. C. R. 444.

[Argument was also heard as to the construction of the will of the plaintiff's father.]

May 1, 1890. STREET, J.:—

I am of opinion that in passing a by-law in this form the council have not carried out what was intended by the Legislature by the section referred to in it; if so general a power had been intended it would have been

easier for the Legislature to say at once that every path-master and other employee of each municipality should have the right to enter upon any land whenever he thought it necessary to do so and to search for and take gravel, timber, stone, and other materials. In the present case the defendants without any further preliminary proceeding began to take gravel from the plaintiff's land, and when the owner protested they justified their action by pointing to this by-law.

Judgment.

Street, J.

What the Legislature did intend, I think, as I gather its meaning from the section referred to, was that the council should, as necessity arose for their doing so, exercise the right to take gravel from any parcel or parcels of land, having first declared the necessity to exist and chosen and described the land from which the gravel was to be taken, by a by-law. This by-law is therefore, I think, upon its face illegal, because it purports to confer upon its officers powers much wider and more extensive than the statute authorizes.

It was objected on the part of the defendants that even supposing the by-law to be illegal they were protected by sec. 338 of the Municipal Act from any action, because it has not been quashed. It is perhaps true that the plaintiff here might be unable until he had quashed the by-law to recover damages for any thing done under even such a by-law as this; but the damages here claimed are trifling; the substantial relief sought is an injunction to restrain the defendants from proceeding to enforce the rights they claim under this by-law. Sec. 338 * does not tie the hands of a person threatened with damage under an illegal

* R. S. O. ch. 184, sec. 338—In case a by-law, order, or resolution is illegal in whole or in part, and in case any thing has been done under it which, by reason of such illegality, gives any person a right of action, no such action shall be brought until one month has elapsed after the by-law, order, or resolution has been quashed or repealed, nor until one month's notice in writing of the intention to bring the action has been given to the corporation, and every such action shall be brought against the corporation alone, and not against any person acting under the by-law, order, or resolution.

Judgment. by-law ; it only prevents his bringing an action to recover
Street, J. damages for a wrong already done him until he has
quashed it. There is nothing therefore in that section to
prevent the plaintiff from maintaining this action, so far
as it is based upon a claim to restrain further damage. See
Wilson v. Middlesex, 18 U. C. R. 348.

[Judgment was also given in favour of the plaintiff
upon the construction of his father's will, holding that he
became entitled thereunder to a vested remainder in fee,
and that he was entitled by virtue of that estate to
restrain the defendants from injuring his inheritance by
taking away gravel, and to the injunction for which he
asked, with costs to be paid by the defendants. No inquiry
as to damages was directed.]

[CHANCERY DIVISION.]

RE GOODFALLOW, TRADERS' BANK V. GOODFALLOW.

Banks and banking—Warehouse receipt—Wheat converted into flour—Following moneys representing such flour—R. S. C. ch. 120, sec. 56.

A miller gave a warehouse receipt to a bank on some wheat "and its product" stored in his mill for advances made to him and died insolvent about two months after. During this period wheat was constantly going out of and fresh wheat coming into the mill. Just before his death the bank took possession and found a large shortage in the wheat which had commenced shortly after the receipt had been given and had continued to a greater or less degree all the time.

In the administration of his estate it appeared that during the period of shortage some of the wheat had been converted into flour which had been sold and the proceeds, which were less than the value of the shortage paid to the administrator:—

Held, that the bank was entitled to the purchase money of the flour.

THIS was an appeal from the report of the Master of this Statement Court at St. Thomas, made in the above proceedings, which were for the administration of the estate of one Goodfallow, deceased.

In the course of the administration the Traders' Bank of Canada put in a claim to certain moneys, the proceeds of flour sold out of the mill of Goodfallow under the following circumstances.

On April 12th, 1888, the Traders' Bank took from Goodfallow, who was a miller, a warehouse receipt on 2,800 bushels of "wheat and its product," which were in his mill at Aylmer. The receipt was in the following form:—

The undersigned acknowledges to have received from G. W. Goodfallow, and to have stored in my warehouse the following goods, wares and merchandise, viz : (2,800) twenty-eight hundred bushels of wheat and its product. Which goods, wares and merchandise are to be delivered pursuant to the order of the Traders' Bank of Canada, to be endorsed hereon, and are to be left in store till delivered pursuant to meet order.

This is intended as a warehouse receipt within the meaning of the Statute of Canada, entitled "An Act relating to Banks and Banking," and the amendments thereto, and within the meaning of all other acts and laws under which a Bank in Canada may acquire a warehouse receipt as security.

(Sigd.) G. W. GOODFALLOW.

Dated Aylmer, 12th April, 1888.

The evidence shewed that Goodfallow died on June 19th, 1888; that the manager of the Bank at Aylmer entered to

Statement.

take possession of the wheat covered by the receipt a few days before this, and then for the first time found that there was a shortage amounting in value to over \$800; and that, in fact, there were only 742 bushels of wheat found in the mill; that this shortage had commenced on April 27th, 1888, and continued steadily till the date when the Bank took possession, and till the death of Goodfallow, at no time amounting to less than a shortage of 600 bushels, which would represent a value of very much more than the money in question in this appeal; that there was no reason to suppose that the wheat in the mill from April 27th onwards was the same wheat as that in the mill when the receipt was given, but, on the contrary, wheat was constantly going out and fresh wheat coming in in the course of Goodfallow's business; that between April 27th and Goodfallow's death certain wheat had been made into flour by Goodfallow, and the flour sold to various parties who had paid their purchase money to the Toronto General Trusts Company, who had been appointed by order, to represent the estate as administrators, and who admitted that it was the product of the flour, as above mentioned, and paid it into Court; that the money thus representing flour sold was \$105.63.

This was the sum in question in this appeal, and was claimed by the Bank under the above circumstances. The estate, however, proved insolvent, and this preferential claim was disputed by the administrators.

The Master held that the Bank were entitled to take the wheat found in the mill at Goodfallow's death, but that it could not follow the flour or its proceeds without proving that it was made from the identical wheat covered by the warehouse receipt.

The Traders' Bank now appealed from the Report in respect to this ruling, and the appeal came on for argument before BOYD, C., on April 3rd, 1890.

A. H. F. Lefroy for the appeal. If this money in question had been in its original form of wheat, and had

been in the mill when we took possession, the Master him- self holds we could have appropriated it. It was not necessary to prove its identity with the 2,800 bushels of wheat in the mill when the receipt was given : *Coffee v. Quebec Bank*, 20 C. P., at pp. 117, 120, 124 ; *Clark v. Western Assurance Co.*, 25 U. C. R. 209. This being so, the Bank Act, R. S. C. ch. 120, secs. 56 and 57, especially, gives the same right to flour, the product of the wheat, as to the wheat itself ; while the general principles of equity give to us the right to go further and follow the money proved to now represent that flour : *Culhane v. Stuart*, 6 O. R. 97, and the cases there cited. There is an American case *McLarren v. Brewer*, 51 Maine, 402, which is very nearly on all fours with this case.

Malone, contra. Not having proved that this flour was the product of wheat included in the 2,800 bushels referred to in the receipt, the appellants are not entitled to succeed.

April 3rd, 1890. BOYD, C. :—

The Bank is entitled to recover the price of all flour made from wheat covered by the warehouse receipt. There was wheat to answer the receipt when it was given, but the shortage began on April 27th, 1888, and, as the Master finds, continued varying in amount till the death of the receptor in June, 1888, and appears to have been never less than 648 bushels at any time. \$105 have been received in respect of wheat or flour sold between April 27th, and June 19th, 1888, which represents a less sum than the amount of shortage at any time during this period. This money must, therefore, be attributable to wheat which was covered by the warehouse receipt, and is in contemplation of law to be identified as the Bank's property. When the receptor reduced the wheat in his mill to a quantity equal to, or less than, the amount in the receipt, the whole of the wheat in his mill was the Bank's property. Such was the condition of affairs from April 27th. Therefore all the wheat made into flour after that date and sold to custom-

Judgment. ers was wheat belonging to the Bank. As long as the
Boyd, C. "product" of this wheat can be traced, whether it be in
flour or in money, it is recoverable by the Bank as
against the deceased and his administrator.

The appeal should be allowed, and costs of claim in
the Master's office and of appeal (taxed on scale propor-
tionate to the amount involved) should be added to the
Bank's debt.

A. H. F. L.

[COMMON PLEAS DIVISION.]

PAISLEY V. WILLS.

Specific performance—Discovery of want of title—Repudiation on other grounds—Control of title—Fraud.

To an action for specific performance of an agreement for the exchange of lands the agreement was admitted, the only defence being fraud and a repudiation therefor. A month prior to the trial, the defendant ascertained that the plaintiff's wife and not the plaintiff, was the owner of the land, and that she had executed a deed thereof to be delivered to the defendant. No claim for repudiation was made on the ground of want of title. At the trial the defendant was allowed to amend by setting up that neither at the time of the agreement nor at the commencement of the action was the plaintiff the owner of the land, without any averment that on the discovery thereof the defendant repudiated on such ground :—

Held, that the amended defence constituted no answer to the action, and that the defendant not having repudiated when he ascertained the plaintiff had no title, it was sufficient if the plaintiff made title on the reference therefor.

THIS was an action tried before FERGUSON, J., at Toronto, Statement.
at the Autumn Chancery Sittings of 1889.

The facts sufficiently appear in the judgment of ROSE, J.

In Michaelmas Sittings, 1889, *Shilton* obtained a stay of proceedings, and moved on notice to set aside the judgment and to enter judgment for the plaintiff, or for a new trial.

In the same sittings, December 7th, 1889, *Shilton* supported the motion. The learned judge should not have allowed the defendant to set up the defence of want of title. This under the circumstance is a technical defence, and is made too late: *Collette v. Goode*, 7 Ch. D. 842; *Caughill v. Clark*, 9 P. R. 471; *Oates v. Supreme Court of Foresters*, 4 O. R. 535. A party must set up every defence in his pleading, or if he desires amendment to be made at the trial he should give notice of his intention to do so: *Roscoe*, N. P. Ev., 15th ed., 297. Con. Rule 444, only authorizes amendments necessary to the advancement of justice, determining the real question or issue raised by or depending on the proceedings, and best calculated to

Argument.

secure the giving of judgment according to the very right and justice of the case. Certainly if the defendant were allowed to set up such defence the plaintiff should have been allowed to amend by adding or substituting the wife as a party plaintiff: *Con. Rule 445; Thorne v. Williams*, 13 O.R. 577. The cases shew that the wife should have been added: *Henderson v. White*, 23 C. P. 78. *Blake v. Done*, 7 H. & N. 465, *McGuin v. Fretts*, 13 O.R. 699. The husband had authority from his wife to enter in the contract. It is sufficient if plaintiff could shew title on the reference to the master: *McDonald v. Murray*, 11 A. R. 101, 120, *Paton v. Rogers*, 6 Madd. 256; *Mortlock v. Buller*, 10 Ves. 315; *Jenkins v. Hiles*, 6 Ves. 646; *Sidebotham v. Barrington*, 4 Beav. 110.

Bain, Q. C., contra. In order to enforce a contract for the sale of land there must be mutuality. The plaintiff had no title to the land, and never had what he contracted to convey, and the defendant was entitled to and did repudiate the contract. The only title the vendor had was contingent upon the will and volition of a third person, namely his wife, and he had no power to compel her to convey. The vendor must have title at the time he enters into the contract: *Brewer v. Broadwood*, 22 Ch. D. 105, 109; *Forrer v. Nash*, 35 Beav. 167; *Wylson v. Dunn*, 34 Ch. D. 577; *Fry on Specific Performance*, 2nd ed., 201, 203; *Dart on V. & P.*, 6th ed., 180; *Russell v. Romanes*, 3 A. R. 635, 642-3. The plaintiff contends that he had a verbal authority from his wife to enter into the contract, but such authority to be binding should have been under seal: *Evans on Principal and Agent*, 22. The cases referred to by the other side are distinguishable, for there was no repudiation.

Shilton in reply. There was no repudiation here on the ground of want of title but of fraud, and it was not until the trial that the repudiation for title was attempted to be set up. The wife had executed a deed ready to be delivered to the defendant.

March 7, 1890. ROSE, J.:—

Judgment.

ROSE, J.

The case came down for trial on the following pleadings:

The plaintiff set out an agreement under seal between himself and the defendant for an exchange of lands, the one property being described as being the defendant's and the other as belonging to the plaintiff.

The agreement was in the shape of an offer under seal by the defendant and an acceptance under seal by the plaintiff.

The statement of claim averred the performance of all necessary conditions on the plaintiff's part and the refusal by the defendant to perform the agreement on his part. The claim was for specific performance, or for damages.

The defendant admitted the execution of the agreement; set up that he was induced to enter into the agreement by the plaintiff's fraud, and that so soon as he became aware of the fraud he repudiated and offered to cancel the agreement.

By counter-claim the defendant asked for a decree for rescission on the ground of the fraud alleged.

On this the plaintiff joined issue. The joinder was on the 12th of September, 1889.

On the 7th of October, 1889, the plaintiff was examined for discovery, when it was shewn that the deed of the property he agreed to exchange was in his wife's name.

The following questions and answers were read at the trial from such examination:

"Q. I suppose your wife trusts you implicitly in the sale of this farm? A. She has done so. Q. You have authority to act for her? A. Yes, sir. Q. You have no deed from her? A. I have no deed. The deed has been made out to Mr. Wills from her."

Upon this examination the defendant made an application for security for costs. The plaintiff was given leave to make the wife a party or to give security for costs. He elected to give security for costs.

No application for leave to amend was made by the defendant until the trial, when upon the case opening, his counsel, said: "I ask leave to amend as follows:

Judgment.

Rose, J.

‘That at the time of the alleged agreement the plaintiff was not the owner of the land, and was not the owner at the time of the commencement of the action.’”

This was opposed by the plaintiff’s counsel, who contended that the defendant should have applied earlier—as soon as he became aware of the facts—but his objection was overruled and the amendment allowed.

The plaintiff then applied for leave to amend, adding the wife as a party plaintiff.

On such application plaintiff’s counsel stated that “a conveyance from the plaintiff’s wife to the defendant was executed by her and offered to the defendant, but this was after the repudiation of the contract by the defendant.”

The only repudiation mentioned before this was the one in the pleadings on the ground of fraud, and we must take it that the plaintiff’s counsel referred to such repudiation.

Plaintiff’s counsel subsequently applied for leave to amend by substituting the wife as plaintiff, and in doing so stated that the plaintiff was prepared to bring evidence to shew that at the time of the agreement, and before the agreement was entered into, the defendant was made aware of the fact that the wife owned the property.

The plaintiff’s application for leave to amend was refused. No evidence was taken except as stated by counsel; and the action was dismissed with costs, on the ground that the title was not in the plaintiff.

The learned Judge said: “I think authorities show the objection taken by the defendant’s counsel *on the record* is a valid objection, and it is not even hinted that the amendment was a surprise to the plaintiff. I think the proper course is to dismiss this action with costs.”

Plaintiff’s counsel then applied for a stay to enable him to take the opinion of this Court, stating that he was taken by surprise.

This application was also refused, and the action dismissed with costs.

The case comes before us in a rather unsatisfactory shape. We have to take the facts from the record and

statements of counsel during the argument before the learned Judge at the trial.

Judgment.

Rose, J.

We have now to consider whether on this record and statement of facts the plaintiff was entitled to have the trial proceed, or whether the mere fact that the title was not in him, although he had control of it, prevented his recovery.

Mr. Shilton's statement that the defendant knew at and before the date of the agreement that the title was in the wife was not denied. He certainly knew it at the date of the examination for discovery, and as he chose to come down for trial without setting up any defence, and without alleging repudiation, on such ground, but solely relying on the charge of fraud, I do not think he was entitled to any consideration at the hearing. He must now, I think, be held strictly to the defence he has been permitted to raise, and certainly no further amendment should be permitted. Had the trial proceeded on the record as originally framed, it seems to me that the only issue was fraud, and if the defendant had failed on that, the plaintiff would have been entitled to a decree for specific performance with a reference as to title, and if he could have shewn title at any time up to the report or decree on further directions he would have succeeded. If this is so, did the amendment as made prevent his recovery? As to the effect of pleadings see *Richardson v. Jenkin*, 10 P. R. at p. 294.

Now what was the contract? WILSON, C. J., in *McDonald v. Murray*, 2 O. R. 573 at p. 584, says: "The plaintiff in such a case has engaged that whenever he can be called on to make a good title he will make it. He does not engage that he himself has the title, but that he will convey a good title: *Marsden v. Moore*, 4 H. & N., 500, at p. 502. The title is perfect when the abstract shews the vendor is either himself competent to convey or can otherwise procure to be vested in the purchaser the legal and equitable estate free from encumbrances. See also Dart on Vendors and Purchasers, 6th ed., 321, *et seq.*"

And Mr. Justice Patterson in *S. C.* 11 A. R., 101, at p. 120, says: "* * because as the learned Chief Justice pointed

Judgment. out in delivering the judgment of the Court, it was not
Rose, J. essential that the plaintiff should himself have any title to the land until the time arrived for the conveyance to the defendant."

In *Fry on Specific Performance*, 2nd ed., p. 576, sec. 1339, it is said: "The enquiry is whether the vendor can make a good title, not whether he could do so at the date of the contract, and therefore when once the inquiry has been directed he may make out his title at any time before the certificate, and if he can do so he will be entitled to a judgment or order in his favor, at least where there has been no unreasonable delay and time is not material."

An examination of the cases will shew, I think, that while the Court has said that it will discourage speculating in other persons' titles, as for instance where one having no interest in an estate enters into a contract for its sale on the chance of being able to purchase or to procure the owner to convey, it has never said that where one not having the title but acting in good faith in the interest of the owner with the owner's knowledge and consent, enters into a contract for sale in his, the plaintiff's own name, the owner being at such time and at all times ready and willing to convey, performance of such a contract will not be enforced, especially when the purchaser was made aware of the facts from the beginning.

It has been held that where the vendor has no title, and this fact has been made known to the purchaser after the making of the contract, he could at once repudiate, and was in a position to ask for rescission, but if he chose not to repudiate but to act upon the contract, to treat it as valid and binding, he could not afterward be heard to raise the objection if the vendor could make good title at any time before the decree on further directions.

The cases I think fully bear out these propositions. See *Daniell's Chancery Practice*, 6th ed., pp. 785-6, 1377, 1113.

In *Paton v. Rogers*, 6 Madd. 256, the Vice-Chancellor held that the vendor might at the hearing on further directions cure the objection there raised.

In *Esdaile v. Stephenson*, same volume, p. 366, the Vice-Chancellor, Sir John Leach, consulted with the Lord Chancellor, Lord Eldon, with a view to settle a general rule, and this rule was formulated: "That where a necessary party to the title was neither in law or equity under the control of the vendor, but had an independent interest, unless there was produced to the master a legal or equitable obligation on the part of the stranger to join in the sale, the master ought to report against the title; otherwise, where a necessary party to the title was under the legal or equitable control of the vendor, as a mortgagee, there the master might well report that upon payment of the mortgage a good title could be made. *That if the master should report against the title, and at the hearing upon further directions the vendor had cured the defect, the Court would then compel the purchaser to take the title*, although it would not suspend the contract with a view to a future proceeding to perfect the title; that if the fact, whether the vendor could at the hearing cure the defect were in question it must be then sent back to the master to review his report with the additional circumstances." This case and rule are cited in the text books without comment.

In *Hoggart v. Scott*, 1 R. & M., (1830), 293, at p. 295, it is said: "An objection was taken *at the hearing*, that the plaintiff at the *time of the contract* had no power of sale and that the contract, therefore, could not be enforced." Sir John Leach, M. R., said: "The objection must be overruled. The defendant, if he had thought fit, might have declined the contract *as soon as he discovered that the plaintiffs had no title*; and he was not bound to wait until they had acquired a title; but, he not having taken that course, it is enough that at the hearing a good title can be made."

Unless that decision has ceased to be good law it seems to me decisive in the plaintiff's favour on the facts as they appear here.

I find the case referred to in both Dart on V. & P., 6th ed., p. 1178, and Watson's Compendium of Equity, 2nd ed., p. 1127, as good law; and in Dart, at p.

Judgment.

Rose, J.

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Rose, J.

1178, there is the following text: "But as a general rule where no legal invalidity affects the contract the enforcement of it in equity is a matter of judicial discretion, and in several cases specific performance has been decreed at the suit of vendors, who contracting under the *bond fide* belief that they could make a good title, afterwards on discovering that they had *no title either legal or equitable*, procured the concurrence of the necessary parties, citing *Hoggart v. Scott* and other cases.

See also *Salisbury v. Hatcher*, 2 Y. C. C., 54, from which the language in Dart at p. 1178 seems to have been taken and was used by the Vice-Chancellor Sir James L. Knight Bruce. He further stated, at p. 63: "In cases of specific performance the want of mutuality is a consideration generally material, but it is contrary to principle and authority to say that perfect mutuality is requisite in order to call a Court of equity into action. There are cases in which the plaintiffs have had a decree for specific performance against defendants, who, when the bill was filed, were not in a condition to enforce specific performance in their own favour. Where no legal invalidity affects the contract, the enforcement of it in this Court is a matter of judicial discretion."

From the quotations I have made from *Macdonald v. Murray, supra*, it would appear that no legal invalidity affects the contract in question.

In *Sidebotham v. Barrington*, 4 Beav. 110, (1841,) on further directions the case stood over to obtain the concurrence of an assignee under a previous insolvency *in whom the estate was vested*.

Counsel objected most strenuously. They said: "This is not a case in which, if the insolvent assignee by agreement joins, the title will be perfect, for he can sell only in the form prescribed by the Act: *Mather v. Priestman*, 9 Sim. 352. * * After all this litigation on a single point, it is asked that the case may stand over and not that the assignee may execute, but that the plaintiff may go before another jurisdiction and see if he can patch up the defect."

The Master of the Rolls, Lord Langdale, said: "The *only doubt* I have in this case is about the form of the order. * * * It appears under the circumstances stated that *now* the plaintiff can *probably* make a good title," &c.

But it is said that *Forrer v. Nash*, 35 Beav, 167, (1865,) followed in *Brewer v. Broadwood*, 22 Ch. D. 105, 109, and quoted as law in *Wylson v. Dunn*, 34 Ch. D. 569, 577, contains a rule that is in the plaintiff's way.

In *Forrer v. Nash*, at p., 171, we find the Master of the Rolls, Lord Romilly, stating: "I am of opinion that when a person sells property which he is neither able to convey himself nor has the power to compel a conveyance of it from any other person, the purchaser, *as soon as he finds that to be the case*, may say: 'I will have nothing to do with it.' The purchaser is not bound to wait to see whether the vendor can induce some third person (who has the power) to join him in making a good title to the property sold."

This seems to me not to state any more stringent rule than that laid down by Sir John Leach in *Hoggart v. Scott*, *supra*, but if anything it is more liberal, introducing, as it does, the provision "nor has the power to compel a conveyance of it from any other person."

In *Forrer v. Nash* there was the repudiation required. And there is this to be noted in that case: The letter from the defendant's solicitors to the plaintiff's solicitors calling attention to the want of title was written on the 22nd of September, 1864. The bill was filed on the 7th of October, 1864. In April, 1865, the landlord made an affidavit that he was willing to do what was necessary to enable the plaintiff to perform his contract.

The Master of the Rolls said, at p. 170: "The plaintiff, at the hearing, says, I have now the power to grant you the lease, and for that purpose he produces an affidavit. * * * If he had made this statement in September, 1864, and the plaintiff had communicated it to the defendant, *there would have been an end of the question.*"

So that it appears clear that until repudiation title can be gotten in, and on the plaintiff's examination for

Judgment.

Rose, J.

discovery in the case before us it appeared that he had control of the title. *Brewer v. Broadwood* was also a case of repudiation.

Wylson v. Dunn decides that the doctrine of non-mutuality being a bar to specific performance does not apply to a contract which to the knowledge of both parties cannot be enforced by either until the occurrence of a contingent event.

In that case Mr. Justice Kekewich defines what he considers to be the doctrine of non-mutuality as "The doctrine that a purchaser *may avoid* a contract *when* he discovers that his vendor has not got that which he contracted to sell," which, read in the light of the cases to which I have referred, means, I take it, that until avoidance the contract is valid and subsisting.

To apply the decisions to the facts we have been considering. We have here a plaintiff coming down to trial on a record which admits the contract and the refusal to perform, and sets up as an excuse that the contract was induced by fraud. If no evidence had been offered would not the plaintiff have been entitled to a decree, and, if the defendant asked for it, with a reference as to title: then the defendant by leave of the Court amends, setting up that the plaintiff was not the owner of the lands either at the time of making of the contract or when the action was brought. The defendant does not by his pleading say when he discovered the fact, or aver that so soon as he discovered it he repudiated the contract; but it does appear by admissions or statements of counsel that this knowledge was acquired a month prior to the trial: that upon the acquisition of such knowledge the defendant procured an order requiring the plaintiff to amend, no doubt on the well known practice that he was not the real plaintiff and might not be able to pay costs: obtained security and came down to trial without, so far as appears, ever seeking to repudiate or avoid the contract on the ground that the plaintiff was not the owner and without seeking to place such a defence on the record. And it further appeared that prior to the trial and prior to the

examination for discovery, and therefore at the trial, the plaintiff had ready to be delivered to the defendant at the proper time a deed of the land made by his wife direct to the defendant.

Judgment.

Rose, J.

In my opinion it was not open to the defendant to repudiate, for the examination that disclosed that the title stood in the wife's name also disclosed that she had made a deed to the defendant. On such facts appearing it seems to me clear on the authorities that the plaintiff was still entitled to his decree, subject of course to the disposition of the issue of fraud, and if that had been found in the plaintiff's favor the most the defendant could have asked was a reference as to title.

The amendment, without the averment that so soon as the defendant became aware of the want of title he repudiated the contract, did not, in my judgment, raise any defence, for as I have pointed out the contract was not that the plaintiff had title but that he would make title whenever called upon to make it.

Indeed it seems to me that the motion for security for costs without repudiation was calculated to mislead the plaintiff into preparing for trial at much expense to meet the issue of fraud and expecting that such was the only issue.

In Daniell's Chancery Practice, at p. 851, it is said: "Thus in suits for the specific performance of contracts the Court will not, in general, permit the question whether a good title can be made or not to be argued before it, in the first instance, even though the objections to the title are stated and the questions arising upon them are properly raised by the pleadings."

On the record of facts now before us it seems to me the plaintiff is entitled to a decree subject to the determination of the question of fraud; and the defendant may, if such question be determined in the plaintiff's favour, have a reference in the form stated in Daniell's Chancery Practice, p. 852, viz.: "Not whether the plaintiff could make a good title at the time of entering into the contract, but whether he can, that is, at the time of the inquiry, make a good title."

Judgment.

Rose, J.

If the defendant desire, the case may go down again for a trial of the issue of fraud. If he do not desire to have such defence tried then the decree may at once go for the plaintiff with a reference.

The defendant must in any event pay the costs of the first trial and of this motion, such costs to be in the cause to the plaintiff in any event.

In this view it is not necessary to enquire whether the plaintiff was entitled to have the amendment asked for. If it would have answered the amended defence he certainly should have been allowed to amend; but if the agreement is to be considered as a deed *inter partes* no authority was cited as showing that the wife, not being a party, could sue upon it. See *Pickering's Claim*, L. R. 6 Ch. 525, 551. Evans on Principal and Agent, Bl. ed., p. 497; Pollock on Contracts, Bl. ed., p. 99, and cases therein cited, which shew that only the parties to a deed can sue or be sued thereon.

Nor is it necessary to determine the plaintiff's rights under his contract to recover damages as prayed, even if not entitled to a decree for specific performance.

The defendant's election as to the trial of the issue of fraud to be made within two weeks and should be without prejudice to his right to appeal.

GALT, C.J., and MACMAHON, J., concurred.

[COMMON PLEAS DIVISION.]

IN RE SHERMAN.

Extradition—Forgery—Evidence.

A cargo of oats was received at an elevator for the S. Co., of which the prisoner was a member, and also secretary and financial manager with power to sign notes, etc. On the day of their receipt a clerk of the S. Co., who was authorized so to do, prisoner having nothing to do with the buying and selling of the grain, signed an order for the delivery of 19,886 bushels of the oats to a railway company, consigned to the S. Co.'s agents in New York, on whom two drafts were drawn by the S. Co. signed by the prisoner, which were accepted and paid. Warehouse receipts transferable by endorsement were given to the S. Co. for these oats, though after the delivery thereof to the railway company, and were allowed to remain with the S. Co. without any demand being made for their cancellation. Subsequently, the prisoner, in the name of the S. Co., discounted two promissory notes at a bank, and endorsed the warehouse receipts as security for the payment thereof, the notes containing a statement that the receipts were pledged as such security with authority to sell, etc., in default of payment.

Held, in extradition proceedings, that the endorsement to the bank of the receipts did not constitute forgery.

THE prisoner was committed by the Judge of the Statement. County Court of the County of York for extradition for forgery committed at Buffalo, in the State of New York.

A writ of *habeas corpus* was issued returnable before the Divisional Court of the Common Pleas Division; and a writ of *certiorari* was also issued to bring up all the papers and proceedings before the said Court.

On the return of the writs, the writs and return were filed and the discharge of the prisoner moved for on the ground that the evidence established no *prima facie* charge of forgery against him.

In Hilary sittings, February 10th, 1890, *Aylesworth*, Q.C., supported the motion.

J. K. Kerr, Q.C., shewed cause.

The facts and the authorities referred to sufficiently appear in the judgment.

March 7th, 1890. GALT, C. J. :—

The facts of the case may be briefly summarized as follows: There was a firm in Buffalo, in which the

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prisoner was a partner, that had for several years carried on a very extensive business in buying and selling grain, under the name of "The Sherman Bros. & Company, limited." The prisoner was the secretary and financial manager, and had power and authority to sign bills, notes, &c., for the company. In the same building in which the office of Sherman Bros. & Co. was situated there was the office of "The Associated Elevators," of which J. F. Sherman (who was a partner in Sherman Bros. & Co., limited) was manager.

On 5th June, 1889, a parcel of white oats was received by "The Associated Elevators," for which they gave a warehouse receipt, and on 8th June another parcel, for which they gave another warehouse receipt. On 5th June an order was addressed to the International Elevator, one of "The Associated Elevators," and given by one Boyle, a clerk in the office of The Sherman Bros. & Co., for the delivery out of 250 bushels, and on the same day another order was addressed to the International Elevator, by another clerk of the name of Nachbar, for the delivery of 19,886 bushels to the West Shore railway. The prisoner had nothing whatever to do with these orders. I may mention that these orders, and the warehouse receipts, refer to the oats as received from a vessel named "Badger State," so there is no question as to their identity.

I have stated the prisoner was the secretary and financial manager, but he had nothing to do with buying and selling oats. This was done by a person named Tyler, who died after the proceedings commenced. The manner in which the grain business was carried on was, as appears from the evidence of one Wurtz, who stated in answer to the question: "How long were you in the employment?" (he had previously stated he was a book-keeper.) A. "From the latter part of August or the first part of September, 1887, until the Receiver was appointed in 1889. Mr. Sherman, the accused, was secretary during that whole time. Mr. Tyler was car grain manager. Q. That involved the control of all the grain that was handled by the company? A. The handling of it, yes sir, the buying and selling. Q.

He bought all the grain and saw it in the elevator? A. Yes. Judgment.
Q. And when it went into the elevators, he kept track of Galt, C.J.
what was in the elevators? A. Yes."

It appears that on 5th June, eighteen cars of oats were forwarded by the West Shore Railway to McIntyre & Wardell, of New York, from the International Elevator under the order I have mentioned signed by Nachbar, a clerk in Sherman Bros. office. These oats had not been sold to McIntyre & Wardell; they were consigned to them as agents; and singular to say, no entry of the transaction was made in the books until after the Receiver had been appointed.

Wurtz states, in answer to the question: "This entry of McIntyre & Wardell, whose writing is that? A. Mine. Q. Was that writing made at the time? A. No, sir, it was not; I think that was made the time the Receiver was appointed. Q. Who told you to make it? A. Nobody told me to make it. I made it from the entry that appears in the sales book." He then is asked as to whose duty it was to have made the entry, and having answered, Mr. Boyle, is then asked: "Did you ever come across any other entries where he did not enter sales? A. I do not know there was any other than that."

It is singular that although from the railway shipping receipts the oats were received from the International elevator on 5th June, the warehouse receipts are dated on 5th and 8th of June after apparently they had shipped the oats on the cars. This however does not signify, for it is plain from the order to deliver the 19,886 bushels and the warehouse receipts that they had reference to the same oats, viz., the "Badger State" cargo, as it is so mentioned in all of them. The oats then having been forwarded to McIntyre & Wardell, the prisoner drew two drafts upon them, one on 7th June, for \$2,740.50, and the other on 8th June for \$3,065.70, which were accepted and paid.

There is no reference to any particular transaction in these drafts nor do they appear to be in the handwriting of the prisoner, but unquestionably they were signed

Judgment. by him, and I think it is beyond question they represented
Galt, C. J. the oats for which the warehouse receipts had been given.

I may mention that the warehouse receipts are numbered 2,729 for 9,667 bushels oats, and dated 5th June, 1889, and the other 2,730 for 10,219 bushels, dated 8th June, 1889. On the 13th of June, the prisoner as secretary made a promissory note payable on demand in favour of the American Exchange Bank of Buffalo, for \$2,500, to which was attached receipt No. 2,730, and on the 29th June made another note payable on demand for \$2,500 to which was attached receipt No. 2,729, and in each note is the following statement, "having pledged to the said bank as security, with authority to sell the same on the non-performance of this provision in such manner as the said bank in its discretion may deem proper, without notice, either at private or public sale, and to apply the proceeds thereon." Reference is then made in each case to the contents of the receipts. These receipts were endorsed by the prisoner.

It is because the oats represented by those receipts had been removed from the elevator by orders of Sherman Bros., although such orders were made without the knowledge or consent of the prisoner at the time they were made, he is charged with forgery.

There are therefore two questions to be considered. First, was the act of the prisoner, if he had knowledge the oats had been removed when he signed the promissory notes and endorsed the warehouse receipts, forgery? Second. Is there evidence on which it can reasonably be found that the prisoner had such knowledge at the time when he made the said notes and endorsements?

As respects the first question. By sec. 3 of "An Act respecting Forgery," R. S. C. 165, it is enacted that in the interpretation of that Act, "The wilful alteration, for any purpose of fraud or deceit, of any document or thing written, printed or otherwise made capable of being read, or of any document or thing the forging of which is made punishable by this Act, shall be held to be a forging thereof."

In this case there was no alteration in the document ; what was done by the prisoner was an endorsement on the warehouse receipt made by him as secretary of "The Sherman Bros. & Company, limited," which the prosecutors contend is forgery, because before the time the endorsement was made, they had received the notes, and the receipt was satisfied. Judgment.
Galt, C. J.

The case of *Regina v. Ritson*, L. R. 1 C. C. R. 200, was relied on as the authority supporting this contention. That case, however, in my opinion, was entirely different from the present. The facts were, that on the 10th January, 1868, W. Ritson had borrowed from the prosecutor, J. Gardner, a sum of money, and as security had given him an equitable mortgage by written agreement and deposit of title deeds. On the 5th May, 1868, he became bankrupt, and on the 7th May, a deed was executed by the trustee and W. Ritson, conveying the land to the prosecutor, who entered into possession. After this had been done, W. Ritson and his son S. Ritson, for the purpose of defrauding the prosecutor, jointly executed a deed, ante dated the 12th March, 1868, demising the land to S. Ritson for 999 years without any reference to the equitable mortgage held by the prosecutor.

S. Ritson, then claiming to be a tenant under the lease, brought an action of trespass against the prosecutor. By so doing S. Ritson averred that W. Ritson had, on the 12th March, made a lease to him, and W. Ritson by executing the lease made the same averment, and by so doing both asserted that the deed had been executed on that day. A deed had certainly been executed on some day, but not on 12th March ; consequently, when S. Ritson produced the deed and claimed title under it he did that which he knew to be false, and virtually changed the date with intent to defraud. It is, moreover, to be borne in mind that the statute under which that conviction took place, viz., 24-25 Vic. ch. 98, contains no definition of forgery whereas our statute does, and I doubt much whether if such an interpretation clause as we possess had been before the Court

Judgment. the judgment would have been the same. There was no
Galt, C.J. "alteration" (that is, as I read our statute) what may be termed a "physical change in the writing"; it was a false deed; and, as said by Lush, J.: "To make a deed appear to be that which it is not, if done with fraudulent intent to deceive, is forgery, whether the falsehood consist in the same or in any other matter." And, in the absence of any clause defining "forgery," the Court held it was forgery under the statute.

Now what are the circumstances of the present case: on the 5th June the Associated Elevator Company gave a warehouse receipt for 9,667 bushels of oats, and on the 8th June another for 10,219, these receipts were transferable by endorsement; the grain covered by both receipts had been removed from the Elevator Association on 5th June and no demand had been made for the return of the receipts; in fact, judging from the receipt of the railway company the greater portion of the grain had been received before the 8th of June. This being the state of affairs on the 13th June the prisoner endorsed the latter receipt to the bank, and there was no alteration in the receipt, and the same observation applies to the assignment of 29th June, how then can it be said to be a forgery under our statute? There was no time fixed by these receipts within which they were to be used, and so long as they remained outstanding the Elevator Association was responsible for them; it was their duty to demand a cancellation of these receipts, and if they did not then they remained liable on them. This was proved in the present case, because it was shewn they had admitted their liability. If this be so how can there be a "forgery"? A forged instrument can convey no right; it is, except as an evidence of crime, as if it had no existence. Consequently if the endorsation by the prisoner transferred a right to demand and receive a certain quantity of grain from the Association and the transferee did receive it, there was no forgery. There may have been a breach of duty between Sherman, Bros. & Co. and the Association, in this that after the Association had delivered

the grain without requiring a cancellation of the receipt it was a fraud on them for Sherman Bros. to transfer the right, but it was no forgery. Judgment.
Galt, C.J.

As I am of opinion there was no forgery, it is unnecessary to consider the second question; but, upon a very careful perusal of the evidence, I am satisfied there is great doubt whether at the time the prisoner endorsed the warehouse receipts he had a knowledge that the oats had been removed, and that he had any intention to defraud the Elevator Association.

MACMAHON, J. :—

The facts, so far as may be necessary for the purpose of this motion, have been fully reviewed in the judgment of his Lordship the Chief Justice.

I have been unable to discover in the facts disclosed by the witnesses before the learned extradition Judge the evidence of any forgery having been committed by the prisoner.

Forgery, by the common law is, "Where a man fraudulently writes or publishes a false deed or writing to the prejudice of the right of another": Comyn's Dig., *Forgery*, A. 1.

Sir William Blackstone defines forgery as the fraudulent *making* or *alteration* of a writing to the prejudice of another's right: 4 Co. 247-8.

"Forgery at common law denotes a false making (which includes every alteration of or addition to a true instrument), a making *malo animo*, of any written instrument for the purpose of fraud and deceit." East's P. C. 852.

Making a fraudulent insertion, alteration or erasure, in any material part of a true instrument, although but in a letter, and even if it be afterwards executed by another person, he not knowing of the deceit; or the fraudulent application of a true signature to a false instrument for which it was not intended, or *vice versa*," will be forgery: East P. C. 855.

JudgmentMacMahon,
J.

One of the earliest illustrations of the fraudulent making of a writing is given by Lord Coke, 3 Inst. 171. In that case a person had written a letter to which he attached his signature—as was customary in those days—some inches below the letter. The prisoner cut off the paper just below the letter, and wrote a release on the blank paper above the signature. This was held to be a forgery.

What was done in that case was the fraudulent application of a false instrument to a true signature.

It was likewise held to be forgery in a man who was ordered to draw a will for a sick person to insert a legacy in it of his own head: *Noy*, 101, cited in Russell on Crimes, 5th ed., vol. ii., 619.

What was done by the person drawing the will was without lawful authority and with a fraudulent intent, and, although executed by the testator (who was ignorant of the deceit), it was the fraudulent application of a true signature to a false instrument.

We were referred by Mr. Kerr to *Regina v. Wilson*, 2 C. & K. 527, in support of his contention that the endorsement by the prisoner, Sherman, of the warehouse receipt, was a forgery.

In *Regina v. Wilson*, the prisoner was a clerk of one John M. Nicholl, who had a bill maturing for £156 9s. 9d., and on the day of its maturity he signed a blank cheque and gave it to the prisoner, directing him to fill up the cheque with the correct amount of the bill and expenses (which would amount to about ten shillings), and after receiving the amount from the bank to pay it over to the holder of the bill and take it up. Instead of doing so the prisoner filled up the cheque for £250, which he received from the bank and retained the whole in his possession in satisfaction for a claim for salary which he alleged to be due him.

The prisoner was convicted of a forgery, on the authority of *Rex v. Minter Hart*, 7 C. & P. 652, and *Regina v. Bateman*, 1 Cox 186.

The prisoner there had no authority to fill in the cheque

but as directed by his master, and the fraudulent insertion by him of an amount in excess of what he was instructed to fill it up with, made it a forgery when done with intent to defraud. It is another instance of the fraudulent application of a false instrument to a true signature: East P. C. 855.

Judgment.
MacMahon,
J.

Regina v. Ritson, L. R. 1 C. C. R. 200, was much pressed upon us by counsel for the prosecution as shewing that what was done by Sherman in endorsing the warehouse receipts, in this case (even had there been evidence that he endorsed them after the oats had been removed from the elevator) was equivalent to what was done by the Ritsons when they ante-dated the deed, which was executed by them for the purpose of defrauding the mortgagee of William Ritson, one of the prisoners.

In that case the instrument itself by which the fraud was attempted to be perpetrated was a false instrument, *i. e.*, it was false as to the date, being that which was material in order to the accomplishment of the fraudulent intent.

In *Regina v. Ritson*, Lush, J., at p. 205, after referring to 24 & 25 Vic. ch. 98, sec. 20, (being the same as our Act, R. S. C. ch. 165, sec. 26) wherein it is provided that "whoever with intent to defraud shall forge or alter

* * any deed," &c., shall be guilty of felony, points out that "it would be absurd to hold that an alteration might constitute a forgery, but an original false making would not."

There is I conceive no analogy between that case and the present. In *Regina v. Ritson*, as pointed out, the deed by reason of the insertion of the false date made it a false instrument. But the warehouse receipt endorsed by Sherman was a genuine and valid instrument in regard to which the Elevator Company was liable to an endorsee for value upon its being endorsed by Sherman Bros., the holders thereof.

To my mind it is the same as if the payee of a promissory note indorsed it after payment to him by the maker but before the maturity thereof.

Judgment. A. B., borrows from C. D., the sum of \$500, for which he gives his promissory note, as follows: "Toronto, July 1st, 1889. Three months after date I promise to pay C. D., the sum of \$500, at his office here, being the amount this day lent by C. D. to me. A. B."

MacMahon,
J.

Two months after giving this note, A. B. pays the amount thereof, but neglects to take up the note. The day after receiving payment, C. D. endorses the note and transfers it for value. The endorsing and transferring of the note was not a forgery by C. D. See *Burbridge v. Manners*, 3 Camp. at p. 194. Still what would be done by C. D. in the case put, would be as much a representation to his indorsee that at the date the indorsement was made, A. B. was still owing the \$500 represented by the note as was the representation by Sherman to the American Exchange Bank that the oats represented by the Elevator Company's receipts were at the times of the endorsements thereof, (if, as I already stated, there was evidence that the endorsements were made after the removal of the oats) still in the possession of the Elevator Company to answer the demand for the oats when called for.

In each of the cases the instruments were genuine, although the endorsement of the note in the one case by the payee, after payment thereof, was a fraud upon the maker, and in the other case the endorsement of the warehouse receipt, if after the removal of the oats, was a fraud upon the Elevator Company. But being genuine instruments there could be no forgery by the holders of such instruments endorsing in either case, because the endorsements were made by the persons named as being entitled to make the same. The maker of the note remained liable because it was his duty to take up the note when paid, and the Elevator Company continued liable because its duty was to demand a delivery up of the warehouse receipt when shipping the oats to New York. It would be by reason of the payee's endorsement of the note not constituting a forgery that the maker still remained liable

to the endorsee, although payment had been made to the payee ; and it was by reason of the endorsement of the warehouse receipts by the prisoner Sherman, in the name of Sherman Bros. & Co., not constituting a forgery that the Elevator Company continued liable to the Exchange Bank for the value of the oats, although they had been shipped by Sherman Bros. to New York.

Judgment.
MacMahon,
J

The authorities all shew that the instrument must be false, and what is *not* a false endorsement of a bill, or a false making of a bill is well illustrated by the cases of *Rex v. Hevey*, 1 Leach 229, decided 1782, and *Regina v. Martin*, 5 Q. B. D. 34, decided in 1879. In the latter case the prisoner Robert Martin, in payment for some goods purchased from the prosecutor, drew a cheque in the name of William Martin upon a bank at which he had no account and gave it to the prosecutor as his own cheque, drawn in his own name, knowing that it would be dishonoured. The prosecutor received the cheque in the belief that it was drawn in the prisoner's own name.

Cockburn, C. J., in delivering the judgment of the Court, consisting of himself, Lush, J., Huddleston, B., Lindley and Hawkins, J.J., said at p. 37: "The case is concluded by authority. In *Dunn's Case*, 1 Lea. C. C. 59 (Case 32) it was agreed by the judges that 'in all forgeries the instrument supposed to be forged must be a false instrument in itself ; and that if a person give a note entirely as his own, his subscribing it by a fictitious name will not make it a forgery, the credit there being given wholly to himself, without any regard to the name, or any relation to a third person.' Upon authority, as well as upon principle, it is clear the conviction should be quashed." See also *Rex v. Story* R. & R. C. C. 81.

As in my opinion the evidence does not shew that the prisoner Wilson H. Sherman was guilty of forgery, he should not be held for extradition, and should be discharged from custody.

Judgment. ROSE, J.:—

Rose, J.

I agree to the conclusion arrived at by the learned Chief Justice and my brother MacMahon, on the ground that there is no evidence to shew when the endorsements were made—whether before or after the grain had been withdrawn from store; and therefore no evidence that they were made when the grain was not in store.

The argument for the prosecution rested upon the hypothesis that the grain had been taken out of store prior to the endorsements. Mr. Kerr urged that the fact of the negotiation being after the shipment of the grain, afforded evidence of the fact. I do not think so.

In Byles on Bills, 14th ed., p. 172, it is said: "Except where an endorsement bears date after the maturity of the bill, every negotiation is *prima facie* deemed to have been effected before the bill was overdue."

During the argument, my brother MacMahon referred to Russell on Crimes, 5th ed., p. 709, where *Rex v. Horwell*, R. & M. C. C. 405, is cited. In that case a count was held bad for not averring that the prisoner uttered the forged acceptance, the holding being that the count was bad *as it was possible* the acceptance might have been taken off the bill before the prisoner uttered it.

As to the question of there being evidence of forgery in this case, apart from the above, I say nothing either one way or the other.

[QUEEN'S BENCH DIVISION,]

BRENNEN V. BRENNEN ET AL.

Husband and wife—Action by wife against husband's relatives—False representations and conspiracy to bring about marriage—Want of precedent—Public policy.

Action by a married woman against the father, mother, and brother of her husband for damages for false representations made to her before marriage as to the character and financial standing of her husband, and for entering into a fraudulent conspiracy to induce the plaintiff to enter into the marriage contract :—

Held, that the action being without precedent and contrary to public policy was not maintainable.

THIS action was brought by Susannah Elizabeth Brennen Statement. against Michael Brennen, Sarah Brennen, and Hugh Scott Brennen.

The amended statement of claim was as follows :

1. The plaintiff is a married woman, the wife of one Joseph Scott Brennen, of the city of Hamilton. The defendants are respectively father, mother, and brother of the said Joseph Scott Brennen.

2. In or about the month of January, 1883, the defendants Michael Brennen and Sarah Brennen commenced negotiations with the plaintiff for the purpose of bringing about a marriage between her, the plaintiff, and their son, the said Joseph Scott Brennen, and subsequently the said Joseph Scott Brennen, and the defendant Hugh Scott Brennen took part in the said negotiations.

3. The result of the said negotiations was that the plaintiff and the said Joseph Scott Brennen became engaged to be and were married on the 7th day of February, 1883.

4. In the course of the said negotiations the defendants represented to the plaintiff, and also to the plaintiff's father and mother, who were part of the time acting on her behalf in the said negotiations :

(a) That the said Joseph Scott Brennen was a sober man and never drank any intoxicating liquor.

Statement.

(b) That he, the said Joseph Scott Brennen, was and always had been a man of unblemished moral character and reputation.

(c) That he, the said Joseph Scott Brennen, was a member of the very large and prosperous firm of M. Brennen & Sons, then and still doing business in the said city of Hamilton.

(d) That he, the said Joseph Scott Brennen, had an income of \$3,000 per annum.

(e) That he, the said Joseph Scott Brennen, had an income of \$3,000 per annum over and above the income which he had as a partner in the said firm of M. Brennen & Sons.

5. In the course of the said negotiations the defendant Michael Brennen made the representations to the plaintiff which are specifically set forth in the next preceding paragraph, and also made the said representations to the plaintiff's father and mother acting part of the time on her behalf during the said negotiations, and for the purpose of obtaining their consent to and approval of the said marriage.

6. In the course of the said negotiations the said Sarah Brennen made the representations to the plaintiff which are specifically set forth in the last mentioned paragraph, and also made the said representations to the plaintiff's father and mother acting part of the time on her behalf during the said negotiations, and for the purpose of obtaining their consent to and approval of the said marriage.

7. Acting on the faith of the said representations, the plaintiff entered into the said engagement and consented to and did marry the said Joseph Scott Brennen at the time hereinbefore set forth, with the consent and approval of her father and mother, also obtained on the faith of the said representations.

8. The said representations were all false, as the defendants well knew when they falsely made them.

9. The said Joseph Scott Brennen was not a sober and moral man at the time the said representations were made, nor at any time thereafter until the separation of the

plaintiff and defendant hereinafter mentioned took place, ^{Statement.} but, on the contrary, was given passionately to intoxicating drink, and was of a very immoral character, and was lewd and licentious, and had one or more illegitimate children.

10. The plaintiff lived with the said Joseph Scott Brennen as his wife from the date of their marriage till the present year (1888) during which time his evil habit of becoming intoxicated, and his grossly immoral and indecent practices and habits, and his cruelty to the plaintiff, were at times unbearable, and at length compelled the plaintiff to separate from him, and cease to live with him as his wife.

Neither was the said Joseph Scott Brennen a member of the said firm of M. Brennen & Sons, nor had he any income whatever, but on the contrary was a poor man, with only a small salary or wages from the said firm or elsewhere.

11. And the plaintiff further charges that the said representations were made by the defendants in pursuance of a fraudulent scheme and conspiracy entered into between them, the said defendants, or between them or some of them, and the said Joseph Scott Brennen, with the object of thereby inducing the plaintiff to enter into the said engagement and to marry the said Joseph Scott Brennen, and of obtaining the consent and approval of her father and mother to the said marriage as aforesaid, they well knowing or believing at the time that if she the plaintiff had known the true character and financial standing of the said Joseph Scott Brennen as they knew it, she never would have entered into said engagement or married him.

11. (a) By reason of the grievances hereinbefore set forth and the misrepresentations aforesaid inducing the plaintiff to marry the said Joseph Scott Brennen, she lost the support and maintenance which she had previously enjoyed from her father and her freedom to make any other marriage, and became bound in life to an unkind, passionate, cruel, dissolute, unfaithful husband, and she suffered much annoyance, disgrace, reproach, contempt, abuse,

Statement. and pain, and loss of health, comfort, and reputation, and suffered other great damage, and the plaintiff during the time she lived with the said Joseph Scott Brennen as aforesaid was poorly maintained and not at all as comfortably and as well as she had a right to be supported and maintained had the income of the said Joseph Scott Brennen been \$3,000 per annum, as it was represented as aforesaid, and the plaintiff is now left entirely destitute and without means of support or maintenance for herself or her child hereinafter mentioned.

11. (b) And the plaintiff further says that on or about the 27th day of June last, and after she had been compelled to leave the home of the said Joseph Scott Brennen as aforesaid, she commenced an action against him in this Court for alimony, and since the said action was commenced, and since the original statement of claim herein was delivered, and for the purpose of further oppressing and injuring the plaintiff, the defendants herein, colluding and conspiring together for that purpose, persuaded and induced the said Joseph Scott Brennen to cease following any occupation or calling whereby he might make money, and to leave Canada and go to the United States of America, so as to prevent the plaintiff from recovering anything from the said Joseph Scott Brennen, and to make the said action for alimony fruitless, and to deprive the plaintiff of support ; and by reason of all the grievances set forth in the foregoing statement of claim the plaintiff is now reduced to complete and permanent destitution, and is prevented from obtaining any substantial redress from the said Joseph Scott Brennen, and has suffered other great damages.

12. There was only one child of said marriage, who is a boy and now four years old and over, and is living with and maintained by the plaintiff.

The plaintiff claims : (1) \$30,000 damages. (2) The costs of this action.

The defendants delivered the following statement of defence and demurrer :

1. The defendants say and each of them says that they ^{Statement.} did not nor did any of them make the representations set forth in the third paragraph of the statement of claim.

2. The plaintiff lived with the said Joseph Scott Brennen as his wife from the time of her marriage till shortly before the commencement of this action, and was during the said time well and sufficiently maintained and supported, and the said Joseph Scott Brennen has always been ever since the said marriage and is now able and willing to well and sufficiently support and maintain the plaintiff.

3. The defendants demur to the plaintiff's amended statement of claim, and say that the same is bad in law on the grounds that no sufficient special damage is alleged to have accrued to the plaintiff by reason of such representations for which she is entitled by law to recover, or which were naturally occasioned by reason of their untruth, or which affected the property of the plaintiff, and on other grounds sufficient in law to sustain this demurrer.

The defendants' demurrer was argued before FALCONBRIDGE, J., in Court on the 5th February, 1889.

S. H. Blake, Q. C., for the defendants. This is a novel cause of action. Representations such as those alleged would not give a cause of action against the plaintiff's husband, much less against third parties. The plaintiff has held to the contract for five years, and had the benefit of it, and has had issue. She cannot now disclaim. As long as that is retained which has been given, no action for damages lies.

The maxim *caveat emptor* applies. It was her duty to make investigations for herself. I refer to *Loffus v. Maw*, 3 Giff. 592 ; *Hammersley v. DeBiel*, 12 Cl. & F. 45 ; *Maddison v. Alderson*, 8 App. Cas. 467 ; *Britain v. Rossiter*, 11 Q. B. D. 123.

There is no contract within the Statute of Frauds. Marriage is not a part performance which will bring the case within the statute ; there must be a memorandum in writing and a consideration, and there is neither in this

Argument.

case. The doctrine of part performance has at any rate nothing to do with personalty : *Britain v. Rossiter*.

This action is in reality brought to compel the defendants to make a settlement on the plaintiff. The statement of claim does not allege that the plaintiff would not have married Joseph Brennen but for the representations—it says (paragraph 11) that the defendants well knew she would not have married him if she had known his true character and standing. An action to compel a settlement will not lie : *Montacute v. Maxwell*, 1 P. Wms. 618 ; *Dundas v. Dutens*, 1 Ves. Jun. 196 ; *Warden v. Jones*, 23 Beav. 487 ; 2 DeG. & J. 76 ; May on Fraudulent Conveyances, 2nd ed., p. 372.

In entering into contracts of this kind, due caution must be exercised. As said in *Wakefield v. McKay*, 1 Phillim. 134, 137, there is no relief for a blind credulity. I also refer to *Sullivan v. Sullivan*, 2 Hagg. Con. 238, at p. 248 ; Bishop on Marriage and Divorce, 5th ed., sec. 204 ; *Roberts v. Roberts*, 3 P. Wms. 66, notes at p. 74.

No sufficient special damage is alleged : *Chamberlain v. Boyd*, 11 Q. B. D. 407 ; *Lynch v. Knight*, 9 H. L. C. 577.

Bicknell, on the same side. Upon grounds of public policy the action does not lie. I refer to Macqueen on Husband and Wife, pp. 1 and 220 ; Schouler on Domestic Relations, 4th ed., secs. 23 and 24.

Actual pecuniary damage must be shewn : *Smith v. Chadwick*, 9 App. Cas. 187 ; *Barber v. Lesiter*, 7 C. B. N. S. 175 ; *Collins v. Cave*, 4 H. & N. 225 ; *Hodgson v. Sidney*, L. R. 1 Ex. 313 ; *Morgan v. Steele*, L. R. 7 Q. B. 611. The plaintiff alleges nothing as to possession of any property ; her position was incapable of being depreciated by her marriage ; and she has been supported and maintained during five years. There is nothing to shew any pecuniary damage, and mental suffering is no ground of recovery : Odgers, 2nd ed., p. 291. She does not allege that she lost the benefit of some other contract then pending ; nor that it was represented to her that she was to get some part of the supposed income of her husband.

The necessity for particularity in contracts relating to marriage is shewn by *Maunsell v. White*,⁴ H. L. C. 1039 ; *Egerton v. Earl Brownlow*, *ib.* 1.

W. A. Reeve, Q.C., for the plaintiff. The authorities cited would be in point if this action were in contract. But it is an action of deceit; false representations are charged inducing the plaintiff to enter into a marriage. See *Kerr on Frauds*, 2nd ed., pp. 383-4, 395, 405-6.

Representations as to the financial standing should be made good : *Montefiori v. Montefiori*, 1 Wm. Bl. 362-3 ; *Neville v. Wilkinson*, 1 Bro. C. C. 543 ; *Gale v. Lindo*, 1 Vern. 475 ; *Hutton v. Rossiter*, 7 De G. M. & G. 9 ; *Burrows v. Lock*, 10 Ves. 470.

The plaintiff when she discovered the falsity of the representations could not take steps to undo the marriage which she had contracted on the faith of them—a marriage perfectly valid and binding, there being no false representations by the husband. That the marriage cannot be undone intensifies the case against the defendants. Paragraph 7 of the statement of claim sufficiently alleges that the plaintiff would not have entered into the contract but for the representations made by the defendants. The representations having been made to the plaintiff, the inference is that she acted upon them. I refer to *Redgrave v. Hurd*, 20 Ch. D. 1 ; *Smith v. Chadwick*, *ib.* at p. 44 ; 9 App. Cas. at p. 196.

As to damages. The plaintiff enters into a contract to improve her position, but does not improve her position. That is the result of the misrepresentations. Loss of marriage is accounted special damage in slander. I refer to *Odgers on Libel and Slander*, 2nd ed., pp. 298-9, 304. *A fortiori*, to contract a bad marriage, which deprives her of the chance of making a good one, is ground for damages. If the plaintiff had discovered the misrepresentations before marriage it would have furnished a sufficient excuse for her breaking off the contract.

The conspiracy to make the husband leave the country, set up in paragraph 11(b) of the statement of claim, is

Argument. either a separate cause of action, or is matter in aggravation of damages. This would, if necessary, support the action.

Blake, in reply. The plaintiff must shew within the authorities that representations were made which the defendants could have been compelled to carry out. *Montefiori v. Montefiori* and the other cases cited are cases of estoppel. Probability of another marriage is mere matter of speculation and not substantial. See *Finlay v. Chirney*, 20 Q. B. D. 494; *Smith v. Chadwick*, 9 App. Cas. at p. 195. Advising a man to leave the country is not actionable.

On the 25th February, 1889, FALCONBRIDGE, J., directed that the demurrer should stand over till the trial, and the issues of fact and law be tried together.

The action was tried before FALCONBRIDGE, J., and a jury, at the Toronto Autumn Assizes, 1889.

J. K. Kerr, Q.C., and *R. S. Neville*, for the plaintiff.

McCarthy, Q.C., and *Bicknell*, for the defendant Michael Brennen.

S. H. Blake, Q.C., for the defendant Sarah Brennen.

J. A. McCarthy, for the defendant Hugh Brennen.

At the conclusion of the plaintiff's case a non-suit was asked for, but the trial Judge allowed the case to go to the jury, who were unable to agree, and were discharged.

On the 19th December, 1889, argument was again heard upon the question whether the action was maintainable.

J. K. Kerr, Q.C., for the plaintiff. The action is founded on conspiracy as well as deceit, and the evidence supported the charge of conspiracy. The representations made were false, and it is immaterial whether they were false to the knowledge of the defendants or not, but as a matter of fact they were untrue to the knowledge of the defendants. It was not necessary for the plaintiff either to affirm or repudiate in a case of this kind. It may be true that the

plaintiff could have satisfied herself by investigation as to the truth of the representations made to her, but as a matter of fact she relied upon the representations made, not only to her, but to her relatives. Argument.

Lord Tenterden's Act does not apply to representations of this kind : Pollock on Torts, p. 255.

It is not necessary that the false representations should be the sole inducement. I refer to Pollock on Torts, p. 240 ; *Wade v. Tatton*, 18 C. B. 371 ; Hastings on Torts, p. 270 ; *Corbett v. Brown*, 8 Bing. 33 ; *Lovell v. Hicks*, 2 Y. & C. Ex. 472, 481.

The plaintiff suffered actual damage by acting on the representations ; she lost the ability to contract another marriage. There is no necessity to shew a consideration. The plaintiff has been placed in a position from which she cannot recede. I refer to *Britain v. Rossiter*, 11 Q. B. D. 123 ; Mayne on Damages, 4th ed., 469 ; Addison on Contracts, 8th ed., 838 ; *Wharton v. Lewis*, 1 C. & P. 529 ; *Money v. Jordan*, 21 L. J. Ch. 531 ; *Richardson v. Silvester*, L. R. 9 Q. B. 34.

R. S. Neville, on the same side. Fraudulent representations are an answer to an action for breach of promise of marriage : Addison on Contracts, 8th ed., 838 ; *Barley v. Walford*, 9 Q. B. D. 197 ; Kerr on Frauds, pp. 505-6. The contract cannot be undone, and an action for deceit is the only remedy : *Pulsford v. Richards*, 17 Beav. 87, 94.

It has been said that an action of this kind is contrary to public policy. Is it public policy that conspiracy and deceit should be justified ?

McCarthy, Q. C., for the defendants. The action is without authority to support it, and should be dismissed. See *Finlay v. Chirney*, 20 Q. B. D. at pp. 497-8. No case of this kind is to be found in the books. Such cases as are to be found bearing on agreements to make settlements, are based on contract. I refer to *Hammersley v. DeBiel*, 12 Cl. & F. 45 ; *Maunsell v. White*, 4 H. L. C. 1039 ; *Moorhouse v. Colvin*, 15 Beav. 341 ; *In re Badcock*, 17 Ch. D. 361 ; *Kay v. Crook*, 3 Sm. & Giff. 407.

Argument.

The action is not maintainable because it is contrary to public policy. If maintainable at all, it is so whether the husband and wife are living together amicably or not, and the wife could equally well sue if they had a happy home and there was no dispute between them. Scandal inevitably ensues from the bringing of an action of this kind. See *Miller v. Miller*, 29 Cent. L. J. 162.

Representations as to the financial position of the husband, unless made with a view to a settlement, are not enforceable either at law or in equity. No matter what are the circumstances of the husband, he has a right to say what establishment he shall keep up. The plaintiff has no right to be maintained upon any special scale of comfort or luxury; the representations amounted to nothing unless they amounted to a contract to make a settlement upon the plaintiff herself.

What damages could the plaintiff claim? It is impossible to give any direction as to damages. The husband was warranted as "a good young man." What damages could there be in respect of that?

J. A. McCarthy, on the same side. Contracts of or relating to marriage are not subject to the same principles as ordinary contracts. There is a special sanctity about the contract of marriage. See *Bishop on Marriage and Divorce*, 6th ed., sec. 167.

The action is against public policy. See *Gilbert v. Sykes*, 16 East 150.

I also refer to the following cases: *Mordaunt v. Moncreiffe*, 43 L. J. P. & M. 49, 52; *Scroggins v. Scroggins*, 3 Dev. (North Carolina) 535; *Bishop on Marriage and Divorce*, 6th ed., sec. 178; *Ferris v. Ferris*, 8 Conn. 166; *Guilford v. Oxford*, 9 Conn. 321; *Reynolds v. Reynolds*, 3 Allen 605; *Wier v. Still*, 31 Iowa 107; *Evans v. Evans*, 1 Hagg. Con. at p. 118.

Kerr, in reply. It is not necessary to avoid the contract in order to bring this action. The impossibility of giving a definite direction as to money damages is no argument. It is the same in breach of promise of marriage.

April 26, 1890. FALCONBRIDGE, J.:—

Judgment.

Falconbridge,
J.

No precedent has been cited for an action like the present one. This fact alone furnishes a potent argument against my now establishing such a precedent.

In *Finlay v. Chirney*, 20 Q. B. D. at p. 498, Lord Esher, M. R., finds authority for the opinion that the action which he is there considering will not lie, in the "fact that there is no case to be found in the books where such an action has been maintained * * and this in spite of the fact that circumstances must frequently have arisen which would invite a decision of the question."

These words are extremely applicable to the case in hand. There are cases where an action has been brought to annul or declare void a marriage as having been procured by force or fraud, or as involving palpable error. And in these cases the injured party when left free to give or withhold assent must have elected not to abide by but to disavow the contract.

Here the plaintiff for five years retained the benefit, such as it was, of the contract which she says she was fraudulently prevailed upon to enter, and children were born of the marriage.

If she had brought an action to void the marriage when she discovered the falsity of the representations which she says were made, she could not have succeeded.

The law, it has been observed, makes no provision for the relief of a blind credulity, however it may have been produced: per Lord Stowell in *Wakefield v. Mackay*, 1 Phillim. at p. 137. "Fraudulent misrepresentations of one party as to birth, social position, fortune, good health, and temperament cannot vitiate the contract": Schouler Dom. Rel., sec. 23; *Erving v. Wheatley*, 2 Hagg. Con. 175.

Nor even does the concealment of previous unchaste and immoral behaviour in general vitiate a marriage; for public policy is said to "open marriage as the gateway to repentance and virtue."

The maxim "*caveat emptor*" seems as brutally and

Judgment.
Falconbridge
J.

necessarily applicable to the case of marrying and taking in marriage as it is to the purchase of a rood of land or of a horse.

A fortiori, the present action cannot be maintained. There has been a change of the position of the parties which can never be revoked. They can never be replaced in their original status; and it would be against public policy, against public morals, and fraught with the greatest damage to the most sacred of the domestic relations, if the plaintiff should be held entitled to succeed.

That such an action should lie is doubly against public policy in this, that if maintainable at all, I see no reason why it should not be equally maintainable whether the husband and wife are or are not living together amicably, so that if it be a wrong sounding in damages for a woman to be linked for life to a man of evil moral character, the astounding spectacle could be presented of a wife launching from the shelter of her husband's house, an action against that husband's relatives for misrepresenting his character and conduct before his marriage !

As to the financial position of the husband, the wife says : " If his character and conduct had been as represented, I would not have minded about his income—if he had been a good man, and if he had enough to keep me."

The plaintiff and her friends allowed the marriage ceremony to be celebrated with great precipitation. Unless Joseph Brennen has wofully changed for the worse in six years, I would have thought that a girl of ordinary discernment would have discovered even in the very brief courtship which took place, that he was not a very safe person to whom to entrust her happiness, be the commendations of his father and mother never so warm.

She took her chances and must now, as far as this Court is concerned, read into her contract the words " for better for worse, for richer for poorer." The praise of the father, the brother, and particularly of the mother, are *simplex commendatio quæ non obligat*.

I was impressed by the difficulty of giving any proper

direction to the jury as to the measure of damages on the different branches of the case. Judgment

Other objections to plaintiff's right to recover were urged, both by way of demurrer and on the facts.

I rest my judgment on the want of precedent for such an action, and on its being clearly, in my opinion, against public policy.

The action will be dismissed with costs.

Proceedings will be stayed until the Divisional Court.

[*The case was not carried further.*]

[QUEEN'S BENCH DIVISION.]

REGINA V. CREIGHTON.

Criminal law — Pleading — Libel — Justification — Particulars — Motion to quash plea — R. S. C. ch. 174, sec. 2, sub-sec. (c) ; sec. 143.

To an indictment for libel, the language of which was couched in vague general terms, the defendant pleaded that the words and statements complained of in the indictment were true in substance and in fact, and that it was for the public benefit that the matters charged in the alleged libel should be published by him :—

Held, that the plea was insufficient because it did not set out the particular facts upon which the defendant intended to rely ; and that the omission from 37 Vic. ch. 38, sec. 5, (R. S. C. ch. 163, sec. 4) of the words "in the manner required in pleading a justification in an action for defamation," which were contained in C. S. U. C. ch. 103, sec. 9, had not the effect of altering the rule :—

Held, also, that this was a case in which the Court should in the exercise of its discretion quash the plea upon a summary motion, without requiring a demurrer, a course permitted by sec. 143 of R. S. C. ch. 174, as interpreted by sec. 2, sub-sec. (c).

At the Spring Assizes for the county of York, 1890, Statement.
MACMAHON, J., presiding, the following indictment for libel was found against the defendants.

CANADA, PROVINCE OF ONTARIO, } The jurors of our Lady the Queen
County of York : *To wit* : } upon their oaths present that
David Creighton, contriving and unlawfully, wickedly, and maliciously
intending to injure, villify, and prejudice the Mail Printing Company of
the said city of Toronto, who are a corporation that publishes a news-

Statement.

paper in the said city of Toronto, called "The Toronto Daily Mail," edited by one Edward Farrer, and to deprive it, the said company, of its good name, fame, credit, reputation, and business connection, and to bring it into public contempt, scandal, infamy, and disgrace, on the twenty-fifth day of January, in the year of our Lord one thousand eight hundred and ninety, unlawfully, wickedly, and maliciously did write and publish and cause and procure to be written and published a false, scandalous, malicious, and defamatory libel in the form of sundry articles and headings of articles in a newspaper published in the city of Toronto, in the county of York, called "The Empire," in a certain part of which articles and headings of articles, namely, in an article and the heading thereto published in the said newspaper called "The Empire," bearing date the twenty-second day of the said month of January, there were and are contained certain false, scandalous, malicious, and defamatory matters and things of and concerning "The Mail Printing Company," according to the tenor and effect following, that is to say :

"The Plot Exposed," "A Desperate and Unholy Annexation Alliance," "The Mail (meaning the said the Mail Printing Company) Deep in the Plot." "Conclusive evidence that the Toronto Mail (meaning the said the Mail Printing Company) has entered into an alliance with the United States Senators to deliver Canada into the Union." "How the Traitorous Work is being carried out." "The most Atrocious Piece of National Rascality that has ever marred Canadian History." "Atrociously Traitorous Conduct on the part of the Mail Newspaper, (meaning the said the Toronto Daily Mail)." "The Mail, (meaning the said The Mail Printing Company) is a Traitor." "The Mail, (meaning the said the Mail Printing Company) in the present is a black Traitor to its Country;" and in a certain other part of which articles, namely, in an article and heading thereto published in the said newspaper called "The Empire," bearing date the twenty-second day of the said month of January, there were and are contained certain false, scandalous, and malicious and defamatory matters and things of and concerning the said the Mail Printing Company, according to the tenor and effect following, that is to say :

"Our commissioner has returned, and the report which he gives this morning leaves no room to further doubt the secret and treasonable intrigues with foreigners which the Mail, (meaning the said the Mail Printing Company) has been carrying on. The plot is now laid bare and the plotters exposed to the gaze and execration of loyal citizens, who will be startled to find that they have been harbouring such traitors in their midst." "Now that their eyes are opened to what has been going on, they will make it known in unmistakable terms that Canada has no room for such traitors."

And in a certain other part of which articles and headings of articles namely, in an article and the heading thereto published in the said newspaper called "The Empire," bearing date the twenty-third day of the said month of January, there were and are contained certain false, scandalous, malicious, and defamatory matters and things of and concerning the said the Mail Printing Company, according to the tenor and effect

following, that is to say : "The Mail's Perfidy," "That a newspaper, Canadian in the sense that it is published in Canada, should plot against its country and become the secret service agent and informer of the more aggressive section of our foreign assailants, is a fact that is startling as an instance of depravity. The evidence of this iniquity is overwhelming, and it is apparent that there are lower depths in the Mail's perfidy yet unrevealed." Statement.

And in a certain other part of which articles and headings of articles, namely, in an article and the heading thereto published in the said newspaper called "The Empire," bearing date the twenty-fourth day of the said month of January, there were and are contained certain false, scandalous, malicious, and defamatory matters and things of and concerning the said the Mail Printing Company, according to the tenor and effect following, that is to say : "'Traitor,' is what the Mail, (meaning the said the Mail Printing Company) admits itself to be ; hunted to earth ; the Traitor (meaning the said the Mail Printing Company) attempts a defence ; still blacker infamy is the only result of the attempt." "Driven to the post, fairly run to earth, the traitorous Mail, (meaning the said the Mail Printing Company) at last has turned, and yesterday attempted a defence against the overwhelming proof furnished by the Empire of its treasonable machinations at Washington." "Proof is usually required, and in a case like this where such important interests are involved, and where a great journal (meaning the said the Toronto Daily Mail) is charged with the blackest crime in the calendar, that proof will need to be of the most clear and irrefragable character." "The reply of the accused (meaning the said the Mail Printing Company) is awaited, and unless the Mail, (meaning the said the Mail Printing Company) can fully clear itself of the serious charges, Canada should have no use for such traitorous sheets, (meaning the said the Toronto Daily Mail)." "Every Canadian knows that in making such statements he, (meaning the said Editor of the Mail) and his journal, (meaning the said the Toronto Daily Mail) acted the part of traitors to their country."

And in a certain other part of which articles and headings of articles, namely, in an article and the heading thereto published in the said newspaper called "The Empire," bearing date the twenty-fourth day of the said month of January, there were and are contained certain false, scandalous, malicious, and defamatory matters and things of and concerning the said the Mail Printing Company, to the tenor and effect following, that is to say : "The Traitor at Bay." "The evidence obtained by the Empire of the disloyal perfidy of the Mail, (meaning the said the Mail Printing Company) in giving secret information to be used against Canada by the foreigners seeking its annexation, has forced the culprits (meaning the said the Mail Printing Company) from their covert after their prolonged and obstinate silence in the face of the first less complete but damaging revelations." "The additional revelations given on our first page to-day completely shatter the last lingering hope of any who thought the Mail would be able to clear itself from the damaging charges, and leave that journal fully exposed as the blackest traitor to its country in the

Statement. ranks of Canadian journalism," meaning thereby that the said the Mail Printing Company, by whom the said newspaper known and entitled "The Toronto Daily Mail" is published, and whose property the said newspaper is, are plotters against their country and guilty of atrocious rascality and atrociously traitorous conduct ; black traitors ; secret service agents and informers of foreign assailants of Canada, guilty of treasonable machinations, charged with the blackest crime in the calendar, giving secret information to be used against Canada ; culprits ; the blackest traitors in their country in the ranks of Canadian journalism ; he, the said David Creighton, then well knowing the said defamatory libel to be false, to the great damage, scandal, and disgrace of them, the said the Mail Printing Company, to the evil example of all others in the like case offending, and against the peace of our Lady the Queen, her Crown and dignity.

The following pleas were pleaded by the defendant :

At the Assizes and general delivery of the Queen's gaol for the county of York holden in and for the said county on the 25th day of March, in the year of our Lord 1890, cometh into Court the said David Creighton, in his own proper person, and, having heard the said indictment read, saith he is not guilty of the said premises in the said indictment above specified and charged upon him, and of this he, the said David Creighton, puts himself upon the country, etc.

And for a further plea in this behalf, the said David Creighton says that our Lady the Queen ought not to prosecute the said indictment further against him, because the words and statements complained of in the said indictment are true in substance and in fact. And the said David Creighton further saith that before and at the time of publishing the said alleged libel it was for the public benefit that the matters charged in the said alleged libel, and all and every of them, should be published by him, and this he is ready to verify ; wherefore he prays judgment, and that by the Court here he may be dismissed and discharged from the said premises in the said indictment above specified.

April 19, 1890. *S. H. Blake*, Q. C., *Osler*, Q. C., and *Marsh*, Q. C., for the prosecution, moved to quash the second plea upon the ground of its insufficiency in not setting out the particular facts upon which the defendant intended to rely as justifying the charges contained in the libels, and as shewing that it was for the public benefit that the matters complained of should be published.

Ritchie, Q. C., *Laidlaw*, Q. C., and *H. Cassels*, for the defendant, contended : (1) that the authority conferred by R. S. C. ch. 174, sec. 143, only applied to motions to quash

indictments, and that no authority was conferred to quash Argument.
a plea ; and (2) that under the Act relating to criminal libel, R. S. C. ch. 163, sec. 4, all that was necessary in a plea of justification was to allege the truth of the defamatory matter complained of, and that it was published for the public benefit.

The following authorities were referred to : Shortt on Informations, &c., pp. 527-8 ; Odgers on Libel, 2nd ed., pp. 177-8, 331, 566 ; Townshend on Slander and Libel, 4th ed., secs. 355-6 ; Archbold's Criminal Pleading, 19th ed., p. 150 ; Wharton's Criminal Law, 9th ed., p. 1646 ; Newell on Defamation, p. 797 ; *T'Anson v. Stuart*, 1 T. R. 748 ; *Baretto v. Pirie*, 26 U. C. R. 468 ; *Fitch v. Lemmon*, 27 U. C. R. 273 ; *Gourley v. Plimsoll*, L. R. 8 C. P. 362 ; *Jones v. Bewicke*, L. R. 5 C. P. 32 ; *Regina v. Newman*, 1 E. & B. 558 ; *Regina v. Labouchere*, 14 Cox, 419 ; *Davison v. Elliott*, 7 E. & B. 229 ; *Commonwealth v. Snelting*, 15 Pick. 337 ; *Regina v. Patteson*, 36 U. C. R. 129 ; *Regina v. Charlesworth*, 9 Cox 44 ; *People v. Harding*, 53 Mich. 481 ; *Rex v. Mason*, 2 T. R. 581 ; *Regina v. Bradlaugh*, 15 Cox 156 ; *Regina v. Rea*, 9 Cox 401.

May 17, 1890. MACMAHON, J. :—

By the Criminal Procedure Act, R. S. C. ch. 174, sec. 143 : " Every objection to any indictment for any defect apparent on the face thereof, shall be taken by demurrer or motion to quash the indictment, before the defendant has pleaded, and not afterwards." And provision is also made in the same section for the immediate amendment of the indictment by the Court before which such objection is taken.

By the interpretation clause in the same Act, sec. 2, sub-sec. (c.) : " The expression ' indictment ' includes information, inquisition, and presentment, as well as indictment, and also any plea, replication, or other pleading, and any record."

The above sections were evidently framed from the

Judgment. Imperial Act, 14 & 15 Vic. ch. 100, secs. 25 and 30 respectively. But sec. 25 of the Imperial Act refers only to "formal defects. So that under the 25th clause of the English Act, where the fault "is more than a 'mere formal defect,'" it is not amendable:" per Pollock, C. B., in *Regina v. Lonsdale*, 4 F. & F. at p. 58; while under sec. 143 of our Act, objection may be taken to "any defect" apparent on the face of the indictment by demurrer or motion to quash, and may be forthwith amended.

MacMahon,
J.

"A 'defect' is the want or absence of something necessary:" Imp. Dict. A good illustration of a defect in an indictment is where an indictment for embezzlement, which charges that within six calendar months the prisoner received three sums, laying a day to the receipt of each, and that "on the several days aforesaid" the prisoner embezzled these sums, is bad, because it does not shew that the sums were embezzled within six months of each other: *Regina v. Purchase*, 1 Car. & M. 617. This objection prior to our 32 & 33 Vic. ch. 29, sec. 32, could only be taken by demurrer, but now by that section can be taken by motion to quash.

Under the statute an objection to a plea may equally with an indictment be properly taken by a motion to quash.

In the case of *Regina v. Maclean*, (not reported), on an indictment for libel found at the Toronto Winter Assizes in January, 1889, a motion was made by the prosecutor to quash the defendant's plea of justification because it set out the facts relied upon as shewing the truth of the matters alleged to be libellous, and thus making it apparent that it was for the public benefit the publication should take place.

The motion in that case was made upon grounds the converse of those taken in the present case. In the *Maclean Case* it was insisted that all the defendant could allege in his plea was that the defamatory matters published were true, and it was for the public benefit that they should be published; and that he could not by his plea place upon

the record the facts relied upon as justifying the alleged libel. Judgment.

MacMahon,
J.

In *Regina v. Maclean* I held that a motion to quash the plea was properly made. And in many cases I would regard it as the more convenient practice.

Suppose to an indictment found for libel in charging the prosecutor with being a thief, the defendant should plead the truth of the matters published, alleging that the prosecutor had committed larceny by stealing five acres of land, the property of one J. B., and also alleging that the publication was for the public benefit. In such a case the preferable way would be to move to strike out the plea, upon the ground that land cannot be the subject of larceny, instead of demurring thereto.

In an Irish case, *Regina v. Rea*, 9 Cox 401, which was a criminal information for a libel on the prosecutor in relation to his office as mayor of Belfast, the first sixteen counts of the information were for words spoken to and of the prosecutor; and the 17th, 18th, and 19th counts were for composing and publishing a libel on the prosecutor as mayor, and of and concerning him in the execution of the duties of his office. The traverser pleaded "not guilty" to the whole information, and a justification in terms similar to the plea pleaded in the present case, with the addition to the plea in that case, that it was the duty of the traverser, as a town councillor of Belfast, to speak the words complained of, and to compose and publish the said matters. There was a motion to set aside the plea and take it off the files. One of the grounds taken against the motion was that the Libel Act, 6 & 7 Vic. ch. 96, sec. 6, did not apply to oral slander, and that that question could only be properly raised and decided by demurrer to the plea. The Court refused to set aside the plea on a summary motion, leaving the prosecutor to demur if he thought proper.

In *Regina v. Hoggan*, Times for Nov. 4th, 1880, cited in Odgers, 2nd ed., p. 597, it is said if sufficient details be not given in such a plea, the only course is for the prosecutor to demur.

Judgment.
MacMahon,
J.

Under the 143rd section of the Act, where there is a defect apparent on the face of an indictment, either course prescribed by the statute is open to the prosecutor ; he may demur, or he may move to quash ; and it is for the Court before which the objection is taken to exercise its discretion, as was done by the Court in *Regina v. Rea*, and say whether it will give effect to a summary motion to quash, or leave the party to his remedy by demurrer.

The Slander and Libel Act, as it appears in the old Con. Stat. of U. C. ch. 103, sec. 9, provides that it shall be a good defence for a defendant to plead the truth of the matters charged by way of justification "in the manner required in pleading a justification in an action for defamation"—in this following the English Act, 6 & 7 Vic. ch. 96, sec. 6.

When the Libel Act was amended by 37 Vic. ch. 38, secs. 5 and 6, the above words in quotation marks were omitted, and are likewise omitted in the R. S. C. ch. 163, sec. 4.

It was urged that the omission of these words from the present Act is an indication that since the Act of 1874, (37 Vic.) it was not the intention that in pleading a justification to an indictment or information for libel the defendant should be required to plead as in an action for defamation, and that all he is now required to say by his plea is that the defamatory matter is true, and that it was for the public benefit it was published.

I think, however, the change made by the Act of 1874 has not the effect claimed by counsel for the defendant ; and the omission of the words indicated was not intended to limit the mode in which a plea of justification should be pleaded, but rather to widen the jurisdiction of the Court in dealing with such pleas when pleaded in such a manner as to withhold what might be deemed sufficient particulars of a charge made by the libel against a prosecutor, and which he is called upon to meet.

In *Hickinbotham v. Leach*, 2 Dowl. N. S. at p. 272, Alderson, B., says : "The object of the plea (of justification) is to give the party who is in truth an accused per-

son, the means of knowing what are the matters alleged against him ;" or as put in Odgers, 2nd ed., p. 178, "The plea ought to state the charge with the same precision as in an indictment."

Judgment.

MacMahon.

J.

"A justification must always be specially pleaded, and with sufficient particularity to enable plaintiff to know precisely what is the charge he will have to meet. If the libel make a vague general charge, as, for instance, that the plaintiff is a swindler, it is not sufficient to plead that he is a swindler ; the defendant must set forth the specific facts which he means to prove in order to shew that the plaintiff is a swindler : " Odgers, 2nd ed., p. 177, citing *Anson v. Stuart*, 1 T. R. 748.

If an indictment were found against a person for libel in publishing that J. B. was a thief, because at a certain time he stole \$100 of the moneys of J. S. ; or that J. B. was a forger, having forged the name of J. S. to a promissory note for the payment of \$500 ; in either of the cases put, the defendant in pleading a justification is only called upon to allege the truth of the matters, and that they were published for the public benefit, because all the necessary facts in the one case shewing how the prosecutor is a thief, and in the other how he is a forger, are stated with sufficient particularity in the libel, and such facts therefore need not be repeated in the plea of justification. But if an indictment were found against a person for calling J. B. a thief or a forger, the defendant, if he desires to plead a justification, must in his plea set forth the specific facts in order to shew how the prosecutor is a felon of the class stated in the libel.

So in regard to the libels set forth in the indictment found against the defendant, by which libels the prosecutors, are called "traitors," and said to have been guilty of "atrociously traitorous conduct," and the Mail is called "a black traitor to its country," the plea fails to shew how and in what manner the prosecutors are "traitors ;" or how they have been guilty of "traitorous conduct ;" or how the Mail has been "a black traitor to its country ;"

Judgment. and the prosecutors are entitled to have in the plea of
MacMahon, justification the facts set forth with sufficient particularity
J. to enable them to see the charge they will have to meet.

In *Regina v. Wilkinson*, 42 U. C. R., decided in 1878, four years after our Libel Act was amended, Harrison, C. J., at pp. 505-6, treated the rule as to the necessity of pleading a justification to an indictment in a like manner to an action for defamation, as being still in existence.

And Taschereau's Criminal Acts, 2nd ed., p. 229, gives the form of a plea of justification under our Libel Act in which the author evidently entertains the opinion that the facts which render the publication of the alleged libel to be for the public benefit must be set out in the plea.

The care to be taken and the particularity required in pleading a justification to an indictment or information for libel is fully considered in *Regina v. Newman*, 1 E. & B. 558, and see p. 561, where the pleas are fully set out. Also *Regina v. Moylan*, 19 U. C. R. 521; *Regina v. Wilkinson*, 42 U. C. R., where at p. 506, Harrison, C. J., gives the result of the cases as being that if the defendant, either in civil or criminal proceedings, has stated in the article complained of, more than he can allege to be true or substantially prove to be true if alleged, he may be found guilty of libel.

I have come to the conclusion for the reasons given that the plea of justification filed is manifestly insufficient, and must be quashed and removed from the files.

Where the objection is that the plea of justification filed is insufficient in its details, as in *Regina v. Hoggan*, or where, as in *Regina v. Rea*, one of the questions raised during the argument of the motion to quash the plea, was whether the Libel Act, 6 & 7 Vic. ch. 96, sec. 6, applied to cases of oral slander, I can well understand the Court before which questions of the character stated were raised, refusing to deal with them by summary motion to quash, and leaving the prosecutor to demur.

No such questions arise as to the plea before me, and I think it a proper case in which to deal with it by a motion to quash.

The defendant will have until the first day of the next Judgment sittings of Oyer and Terminer at Toronto in which to MacMahon, file an amended plea of justification. J.

The costs of and incidental to this motion can be disposed of when the Judge who presides at the trial is disposing of the costs at the trial.

[QUEEN'S BENCH DIVISION].

COUNTY OF MIDDLESEX V. SMALLMAN ET AL.

Registry laws—Bond for performance of duties of office of Registrar—Payment to municipality of portion of fees—Liability of sureties—R. S. O. ch. 114, secs. 13, 107.

Action upon a bond of the defendants as sureties for a Registrar of deeds, dated 8th January, 1886, to recover the portion of fees received by him which he should have paid over to the plaintiffs under the Registry Act, R. S. O. ch. 114, sec. 107.

The bond was in the form prescribed by schedule A. of the Act, and was conditioned for the performance of the duties of the Registrar's office and against neglect or wilful misconduct in office to the damage of any person or persons.

The form was prescribed before the introduction of the provisions now contained in sec. 107 of the Registry Act, which by sec. 13 makes provision for the giving of special security for the payment of moneys under sec. 107 :—

Held, that the bond given by the defendants must be taken to be restricted to the performance by the Registrar of the duties imposed upon him other than the duty imposed by sec. 107 ; and the action was dismissed.

THIS was an action tried before STREET, J., at London, Statement without a jury, on 15th May, 1890.

The plaintiffs were the corporation of the county of Middlesex ; the defendants were the sureties for the late Registrar of the north and east ridings of the county. The action was brought upon a bond dated 8th January, 1886, in the form given in Schedule A. to the Registry Act, to recover \$737.50 and interest, being the portion of the fees received by the Registrar which he should have paid over to the plaintiffs, under the 107th section of the Registry Act, ch. 114, R. S. O.

The defence was that under the bond they gave, the sureties were not liable for the payment of these moneys.

Argument.

Purdom, for the plaintiffs.

Osler, Q. C., and *Flock*, Q. C., for the defendants.

The following Ontario statutes were referred to by counsel : 31 Vic. ch. 20, secs. 9 and 17-21 ; 35 Vic. ch. 27 ; 36 Vic. ch. 6, sec. 3 ; 39 Vic. ch. 17, sec. 10 ; R. S. O. 1877 ch. 111, secs. 8, 9, 13, 20-24, 104, 108 ; 40 Vic. ch. 6, sec. 10 ; R. S. O. 1887 ch. 114, secs. 8, 9, 13, 20-24, 107.

The following authorities were also referred to : Murfree on Official Bonds (1885), secs. 179, 460, 488 ; De Colyar on Guaranties, 2nd ed., p. 206 ; *Gray v. Ingersoll*, 16 O. R. 194.

May 21, 1890. STREET, J.:—

The form of the bond here sued on is that which was prescribed by the Registry Acts in force before the introduction of the provisions giving to the county or city municipalities a share in the Registrar's fees, and the same form has been preserved down to the present time, notwithstanding those provisions. The condition is that the Registrar shall "perform the duties of his office as such Registrar, and that neither he nor his deputy shall negligently or wilfully misconduct himself in his said office to the damage of any person or persons whomsoever."

By sec. 107 of the Act (R. S. O. 1887 ch. 114) it is made compulsory upon any Registrar, the fees of whose office have exceeded a certain sum, to pay over to the county or city municipality a certain proportion of the excess.

Had there been no clause in the Act under which the present bond was given, dealing specially with the question of the security to be given for the payment by the Registrar to the municipality of the prescribed portion of his fees, I think the terms of the bond would have been sufficient to make the sureties liable. The words used are, as might be expected from the object with which the form was originally framed, more apt to cover the performance of duties than the payment of moneys, but the conclusion

might, without much straining, have been reached that a Registrar who did not pay over moneys belonging to the municipality was not faithfully performing the duties of his office. The 13th section of the same Act, however, makes special provision for the giving of special security for the payment of these moneys. It enacts that "The Lieutenant-Governor, upon the application of any county or city interested, or without such application if he thinks fit, may require any Registrar to give security in such form and for such an amount as the Lieutenant-Governor in Council determines to be sufficient to secure the due payment of any moneys payable by the Registrar to the county or city."

Judgment.
Street, J.

I think it cannot be held that where such a special security is given there are two sets of sureties for the payment of these moneys, and if so, then until the special security for them is given, it would seem to follow that no security exists for them. The history of the legislation, I think, strengthens this view.

Previous to 35 Vic. ch. 27 Registrars retained all fees to their own use, and gave one bond only in the statutory form which still exists, and is that which the defendants executed.

By 35 Vic. ch. 27 Registrars were required for the first time to pay part of their fees to the municipality, but no provision was made for their giving security for such payments. This omission was rectified by 39 Vic. ch. 17, sec. 10, which is the same as sec. 13 of the present Registry Act.

The result seems to be that the bond given under sec. 9 must be taken to be restricted to the performance by the Registrar of the duties imposed upon him, other than the duty of paying over to the municipality the prescribed portion of his fees, and that if an interested municipality should desire to have security for the moneys payable to it by the Registrar, it must obtain a special bond for the purpose.

Action dismissed with costs.

[COMMON PLEAS DIVISION.]

REGINA V. HERMAN LLOYD, GEORGE LLOYD AND
ALBERT LLOYD.

Criminal Law—Rape—Crown case reserved—Evidence to go to jury.

On a Crown case reserved it is not proper to reserve the question whether there is sufficient evidence in support of the criminal charge, that being a question for the jury ; whether there is any evidence is a question of law for the Judge.

The evidence against the prisoners here was the uncorroborated evidence of the woman charged to have been raped which, in view of admissions made by her, and the circumstances, was unsatisfactory :—

Held, that the evidence was properly submitted to the jury, but the Court directed that the attention of the executive should be called to the case.

Statement.

THE prisoners were tried at the Belleville Assizes on the 22nd day of April, 1889, before FALCONBRIDGE, J., and a jury, on an indictment charging the prisoner, Herman Lloyd, with having on the 2nd day of September, 1888, at the Township of Tyendenaga, in the County of Hastings, committed a rape on one Anne Denton, and the prisoners George Lloyd and Albert Lloyd with aiding and abetting in the commission of the said felony.

The jury returned a verdict of guilty against all the prisoners; and the learned trial Judge reserved for the opinion of the Justices of the Common Pleas Division of the High Court of Justice as a Court for Crown Cases Reserved the following case :

1. The prisoners were defended by different counsel, Mr. Dickson, Q.C., for Albert Lloyd, and Mr. Burdett for Herman Lloyd and George Lloyd ; and both counsel for the defence cross-examined the witnesses for the prosecution.

2. The counsel for the Crown, upon re-examination of Annie Denton, who was the principal witness for the Crown, examined her at length as to previous acts of criminal connection alleged by her to have been had by the said Albert Lloyd with her feloniously and against her will, which re-examination upon these distinct felonies as if they were charged in the indictment, the counsel for the defendant Albert Lloyd objected to, upon the ground that he was not on trial for and not prepared to answer such charges then, and that their expansion before the jury would naturally prejudice the jurors against his client, the said Albert Lloyd.

3. The only evidence of the alleged crime was that given by Annie Denton, upon whom it was charged to have been committed. She deposed that on the Sunday afternoon in question she had got into a buggy with the prisoner Herman Lloyd to go with him for a drive to Chisholm's Mills, starting from the residence of Albert Lloyd, where she was staying, about a mile distant from Chisholm's Mills. They drove to Asa Lloyd's, a brother of the prisoner, about seven miles distant. There they met the prisoner George Lloyd, and he left Asa Lloyd's at the same time as Herman Lloyd and Annie Denton the prosecutrix, who swears that George Lloyd got into the buggy with them and rode with them for some distance, and then George Lloyd got out of the buggy and Herman Lloyd, with Annie Denton, drove on into woods called Hall's Woods, and there she stated the act was committed by Herman Lloyd while they were alone; that a few minutes after he had committed the offence the prisoner George Lloyd came through the woods, and that he, too, had connection with her against her will. That a few minutes after this the other prisoner, Albert Lloyd, came to the place where they were and asked her, according to her evidence, to consent that he might have connection with her, which she refused to do, and thereupon that Albert Lloyd went away without molesting her. That Herman Lloyd then drove with her in the buggy to Albert Lloyd's, where she remained for another week until the second Monday following this Sunday, during which time she made no complaint, nor did she tell her sister, the wife of Albert Lloyd, or anyone what had been done to her.

4. The prosecutrix, Annie Denton, stated in cross-examination that at the time of the alleged rape on the Sunday evening mentioned, that the prisoner Albert Lloyd was getting ready to thresh his grain. She also states that one Thomas Emerson did the threshing for Albert Lloyd that fall, and that the way from Albert Lloyd's to Thomas Emerson's is past Asa Lloyd's: that the road through Hall's Woods is the road to Asa Lloyd's from Albert Lloyd's: that it was not fenced on either side through the woods; and she says that Herman only drove a few feet off the regular road, also that there was a road into the woods on which Herman Lloyd drove off the main road with her. She says she struggled hard and screamed loudly both when Herman Lloyd and George Lloyd had connection with her. She also testified that during the week preceding this Sunday Albert Lloyd had had connection with her, and assigned as her reason for accepting Herman Lloyd's invitation to go out riding under these circumstances that she "thought he was just as nice as anybody else." She says that when they left Albert Lloyd's the express intention was to drive to Chisholm's Mills, and that neither George Lloyd nor Albert Lloyd were present, nor were either of them present when she and Herman Lloyd started on their drive, and it was after they had started that the destination was changed to Asa Lloyd's with her consent. She thinks something was said about the proposed drive to Chisholm's Mills at the supper table; and she also states that Asa Lloyd's is in the opposite direction from Chisholm's Mills.

5. The prosecutrix also swore that the prisoner Albert Lloyd had had

Statement, connection with her in June, 1887, after which she returned to Albert Lloyd's in 1888, but that she had never told anyone of this during the year and over which intervened after the first connection and before she returned to his place in 1888. She also stated that during her visit in 1888 Albert Lloyd had connection with her twice, but that she said nothing about it to anyone until after the third time, although she had every opportunity to complain of the acts or to go away from Albert Lloyd's house.

6. It was shown that on the trial of a former indictment against the prisoner Albert Lloyd upon a charge of rape committed upon the prosecutrix in 1887, which trial was had before Mr. Justice Rose in the fall of 1888, the witness, Annie Denton, had sworn that both Herman Lloyd and George Lloyd each had had connection with her once at least before the occasion in Hall's Woods.

7. The Crown counsel, in re-examination of Annie Denton, the prosecutrix, examined her in detail in reference to the previous acts of illicit connection had between her and Albert Lloyd. Albert Lloyd's counsel objected upon the ground that it would prejudice his defence to this indictment in the minds of the jury, and that his client was not being tried for such acts.

8. The whole of the evidence as taken by the official reporter and my charge to the jury is herewith submitted as part of this case for the consideration of the said Justices of the Common Pleas Division of the High Court of Justice.

The questions for the said Judges are :

(1.) Was the evidence against Albert Lloyd such as was sufficient and proper to submit to a jury in support of the indictment against him hereinbefore set forth, or should I have withdrawn the case from the jury and directed an acquittal of Albert Lloyd ?

(2.) Was the evidence on re-examination, as against Albert Lloyd, properly admitted ?

(3.) Was the evidence against Herman Lloyd of that character that it was safe and proper to submit it to a jury on a charge of rape against him ?

(4.) Was the evidence against George Lloyd such as was sufficient and proper to submit to a jury in support of the indictment against him hereinbefore set forth ?

(5.) If the said Justices should answer either the first or second questions in the negative, then the verdict of guilty against Albert Lloyd shall be vacated and set aside and quashed.

(6.) If the said Justices should answer the third question in the negative, then the said verdict as against the prisoner Herman Lloyd shall be vacated and quashed.

(7.) If the said Justices should answer the fourth question in the negative, then the said verdict as against George Lloyd shall be quashed and vacated.

In Hilary sittings, February 15, 1890, the case was argued before GALT, C.J., ROSE and MACMAHON, J.J.

Bigelow, Q. C., for the prisoners.

Argument.

J. R. Cartwright, for the Crown.

March 8, 1890. MACMAHON, J.

The evidence is somewhat voluminous, but the main facts developed during the trial are nearly all sufficiently set forth in the case reserved by my learned brother FALCONBRIDGE.

There is no evidence whatever to connect Albert Lloyd with the offence charged. The facts as stated in the third paragraph of the case shew that at the time Herman and the prosecutrix started for their drive from Albert's house on the Sunday evening in question, they drove in a contrary direction to that at first contemplated. When Herman asked Annie Denton to go for a drive, the proposed destination was Chisholm's Mills, a mile from Albert's house, and instead of going there they drove in an opposite direction, a distance of seven miles, to Asa Lloyd's. There is no evidence that Herman had communicated to Albert the direction in which he was going, and from what took place prior to leaving Albert's house, the purpose appeared to be to go to Chisholm's Mills.

If Albert appeared in Hall's Woods, as the prosecutrix states he did, after she had been criminally assaulted by the prisoners Herman and George, he (Albert) never molested her; and there is no evidence of any agreement between him and Herman that he should be in the vicinity of the place where it is alleged the assault was committed by the prisoners Herman and George.

In order to make Albert an aider and abettor under this indictment, he must have been present either actually or constructively; and a person is present in construction of law aiding and abetting if with the intention of giving assistance he is near enough to afford it should occasion arise. Thus, if he was watching at a proper distance, to prevent a surprise, or to favour the escape of those who were more immediately engaged, then he

Judgment. (Albert) would be a principal in the second degree: Roscoe's
MacMahon, Cr. Ev., (10 ed.), pp. 182-3. Archbold's Cr. Pl. (10 ed.) 9 & 10.
J.

There was no evidence to shew such a state of facts, and the learned Judge should, we think, have withdrawn the case as against Albert Lloyd from the jury.

As to the case against the prisoners Herman and George, we cannot say that there was not evidence which the learned trial Judge should have submitted to the jury against them, although, as stated in the sixth paragraph of the case the prosecutrix swore on the trial of a former indictment against Albert Lloyd upon a charge of rape said to have been committed upon her in 1887, that both Herman Lloyd and George Lloyd had connection with her at least once before the Sunday on which they assaulted her in Hall's woods.

These facts were before the jury, and were commented upon by my learned brother FALCONBRIDGE in his charge, and it was for the jury to weigh the evidence of the prosecutrix and say what credit should be given to her testimony.

Even in cases where, upon the trial of a prisoner, the evidence of an accomplice is not corroborated, the jury may convict, although it is now the universal practice for judges to advise juries that it is unsafe to convict upon the testimony of an accomplice alone. "It is not a rule of law that an accomplice must be corroborated, but a rule of practice merely": see Jervis, C.J., in *Regina v. Stubbs*, 7 Cox. C. C. 48, 51; and Lord Campbell in *Regina v. Jones*, 2 Camp. 131, speaking of the evidence of an accomplice, says, at p. 132: "If he is believed, his testimony is unquestionably sufficient to establish the facts to which he deposes." See cases collected on this point in *Regina v. Smith*, 38 U. C. R. 218, at p. 229; and in *Regina v. Andrews*, 12 O. R. 184.

In charges of rape the law as to the credit to be attached to the evidence of the person ravished is thus stated by Lord Hale: "The credibility of her testimony, and how far she is to be believed, must be left to the jury, and is more

or less credible according to the circumstances of fact that concur in that testimony:" 1 Hale P. C., 633. Judgment.

In the case against the prisoners, which we are called upon to consider, we may, in view of the statement in the sixth paragraph of the case to which I have already referred, adopt the very apt language of Robinson, C.J., in delivering the judgment of the Court in *Regina v. Baby*, 12 U. C. R. 346, in 1855, at which time under the statute then in force the Courts were empowered to grant new trials in criminal cases. He says at p. 353: "The statute * * gives us no authority to order a new trial, or to prevent a verdict of guilty from going into effect because we may think the jury would have exercised a sounder judgment if they had acquitted. We may consider the evidence for the prosecution to be weak; we may find it to be conflicting, and may have a strong impression that, if we ourselves had formed part of the jury we might not have been satisfied with it."

MacMahon,
J.

So in the case in hand we may consider the evidence of the prosecutrix weak; we may, in view of the admissions made during the trial, consider some of the statements made against the prisoners Herman and George as improbable; but the probable truth or falsity of the statements was for the consideration of the jury. and although we may think they did not exercise a sound judgment in reaching their verdict, we cannot say there was no evidence to be submitted to them, and therefore the learned Judge was not bound to withdraw the case from the jury.

The question reserved as to whether the evidence was sufficient and proper to be submitted to the jury was not a question of law arising at the trial, and the reservation was therefore not properly made. Whether there was any evidence was a question of law for the Judge; its sufficiency was a question of fact for the jury.

While reaching the conclusion that the case could not have been withdrawn from the jury as to Herman Lloyd and George Lloyd, yet in view of the admission made by the prosecutrix that prior to the alleged rape charged in

Judgment. the indictment they had connection with her, it is proper
 MacMahon, that the attention of the Executive should be drawn to the
 J. case of these prisoners.

There will be judgment for the Crown as against the prisoners Herman Lloyd and George Lloyd; and there will be judgment quashing the conviction as against the prisoner Albert Lloyd.

GALT, C.J., and ROSE, J., concurred.

[COMMON PLEAS DIVISION.]

MEYERS V. THE HAMILTON PROVIDENT AND LOAN COMPANY.

Will—Rule in Shelley's Case—Trust—Restraint on alienation by sale but not by mortgage—Rule against perpetuities.

A testator by his will devised certain lands to his son N. M., for life and after his decease to his heirs and assigns forever, but subject to the payment within three years out of the rents and income of a sum of money charged upon the lands therein specified; after his death the land was to be sold provided N. M.'s youngest child then living was of the age of twenty-one years, the proceeds thereof to be equally divided between N. M.'s children at the time of the sale:—

Held, affirming the judgment of STREET, J., at the trial, that under the rule in *Shelley's Case* N. M. took an estate in fee simple in the land, but reversing it so far as it held that there was a trust in favour of N. M.'s children.

Held, also, that by the terms of the will there was a restraint on alienation by sale, but not by mortgage.

Held, lastly that the executory devise in favour of N. M.'s children was void as a violation of the rule against perpetuities.

Statement.

THIS was an action commenced before STREET, J., without a jury, at Brantford on the 6th of November and continued at Toronto on the 11th of November, 1889.

The action was brought by the plaintiff to obtain a declaratory judgment as to the title which passed to him under the will of David Meyers, and to restrain the mortgagees, the Hamilton Provident and Loan Society, from selling under the mortgage until the title was declared by the Court.

The learned Judge delivered the following judgment, which contains the clause of the will before the Court for consideration, and states fully the facts:

STREET, J.:—The circumstances in this case were as follows: David Meyers being the owner in fee simple of the lands in question made his last will, bearing date on 27th December, 1851, and died on 2nd July, following.

The third clause of his will is as follows:

“I give and bequeath unto my third son Nelson Meyers during his natural life and after his decease to his heirs and their assigns forever, lot No. 25 in the 5th concession, township of Ancaster. This endowment of Nelson Meyers is subject to the hereafter named reservations: I bind and oblige Nelson Meyers to pay or cause to be paid out of the rents or incomes of his endowment in this will the sum of £43, 15s. of lawful money. This sum of money is to be paid within three years after my decease, and it is also to be paid to the following persons, that is to say, £25 to my son Jacob Meyer; £6, 5s. to my eldest daughter Mary Ann Hardy; £6, 5s. to my second daughter Amanda Lambkin, and £6, 5s. to Jane Eliza Miller, the girl that I have had from a child. The lot of land that Nelson Meyers is endowed with in this will is to be sold, but not during Nelson Meyers' natural life and not after his death until his youngest child then living is of the full age of 21 years, and it is to be sold within three years after Nelson Meyers' youngest child is of the full age of 21 years, providing Nelson Meyers is dead. The proceeds received from the sale of this lot of land is to be equally divided between Nelson Meyers' children at the time of the sale.”

No other part of the will is of any assistance in construing this clause.

Upon the death of the testator, Nelson Meyers entered into possession of the lands in question and has ever since continued in possession of them. He had three children living at the time of the death of his father David Meyers, all of whom are parties defendants in this action.

On the 27th of January, 1883, Nelson Meyers executed a disentailing deed for the purpose, as it appears, of vesting a fee simple in himself and his heirs.

On the 1st of August, 1885, he executed a mortgage upon the property to the defendants, the Hamilton Provident and Loan Society. That mortgage being in arrear the mortgagees took proceedings under their power of sale, but were unable to obtain a purchaser owing, as it is stated, to doubts as to Nelson Myers's right to convey a good title.

Judgment.

Street, J.

This action is now brought by him to obtain a declaratory judgment as to the title which passed to him by the will, and to restrain the mortgagees from selling until the title is declared by the Court.

The latter part of the relief asked is one which I think should not be entertained. The plaintiff has conveyed to the mortgagees covenanting with them that he had a good title, and upon the faith of his title the mortgagees have advanced him a considerable sum of money; he has made default in repaying it; and it cannot be allowed that he should urge doubts as to the title as a reason why the mortgagees should not be allowed to realize their security. He had, however, a right to have a declaration as against his children of his right to the property; and it does not seem to be improper to join the mortgagees for the purpose of obtaining it.

The intention of the testator in regard to this property is, I think, plainly to be gathered from his will. His desire was that Nelson Meyers should enjoy it for his life, paying out of the rents the legacies which he specifies, and that upon his death, and within three years of the youngest child attaining 21 years of age, whichever event should last happen, the property should be sold and the proceeds divided amongst his children then living.

In carrying out this intention he has first created a fee simple in Nelson Meyers by devising to him the property for life with remainder to his heirs, but the fee simple so devised *must in order to carry out the subsequent provisions be construed as being upon a trust to sell the land at the period specified in the will and to divide the proceeds amongst the children of the devisee for life then living.*

It is not necessary that formal words declaring a trust should be used. It is only necessary that an intention should be manifested by the testator with respect to the property in favour of an ascertained person or class of persons, *and the intention will be executed through the medium of a trust however informal the language may be*

in which the intention may have been expressed. Here the property is devised to Nelson Meyers expressly subject to the subsequent reservations which are that out of the rents and income he shall pay the legacies and that at or shortly after his death it shall be sold and the proceeds of the sale divided amongst his children then living. Subject then to these conditions he takes the property and may apply the rents and income to his own purposes after paying the legacies. When the time comes for a sale of the property the trust for sale arises and is to be exercised by the persons then entitled to the legal estate under the will of David Meyers, that is to say, by the heirs of Nelson Meyers, or by his or their assigns, for every assign must take subject to the terms of the will. Nelson Meyers therefore took a beneficial interest in the land for his life subject to the payment of the legacies which are charged on it, and there is nothing in the will to prevent his disposing of it. This interest is what passed to the mortgagees and the disentailing deed was of no force or validity.

The plaintiffs should pay the costs of this action.

The declaration will of course not be binding upon any children of Nelson Meyers who may hereafter come into existence and who may become entitled to a share of the proceeds of the sale of the property.

In Michaelmas Sittings, 1889, the plaintiff moved on notice to vary the judgment.

In Hilary Sittings of the Divisional Court, (composed of GALT, C. J., and MACMAHON, J.), February 12, 1890, *Crerar*, Q. C., and *VanNorman*, Q. C., supported the motion.

Hoyles, Q. C., contra.

March 8, 1890, MACMAHON, J.:—

I agree with Mr. Justice Street in that part of his judgment which holds that by the words in the will "I give and bequeath unto my third son Nelson Meyers during his

Judgment.

Street, J.

Judgment.
MacMahon,
J.

natural life and after his decease to his heirs and their assigns forever," the testator created a fee simple in Nelson Meyers, under the rule in *Shelley's case*. And in regard to that rule the learned author of *Tudor's Leading Cases on Real Property*, 3th ed., p. 599, says : "There is no rule which has been adhered to more inflexibly than that which is termed the rule in *Shelley's Case*, viz., that when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited by way of remainder either mediately or immediately to his heirs in fee or in tail, in such cases 'the heirs' are words of limitation of the estate and not words of purchase."

Mr. Hoyles's argument was that as there were "children" of Nelson Meyers living at the date of the devise the use of that word by the testator in the latter part of the clause of the will could not be *prima facie* considered as a word of limitation; and that the words "their assigns," following the words "heirs," made the latter a word of purchase.

In *Theobald on Wills*, 3rd ed., 313, the rule of construction is thus stated : "The rules of construction with reference to cases coming within the operation of the rule in *Shelley's Case* are settled by the leading cases of *Jesson v. Wright*, 2 Bligh 1, and *Roddy v. Fitzgerald*, 6 H. L. 823. Where the words "heirs" or "heirs of the body" are used in the limitation of the inheritance the rule applies.—(1) Although the limitation of the freehold to the ancestor may be followed by words clearly indicating an intention that the estate is to be for life only. Thus, it is immaterial, that the estate of the ancestor may be declared to be 'for life and no longer': *Roe d. Thong v. Bedford*, 4 M. & S. 362; *Robinson v. Robinson*, 1 Burr. 38, 2 Ves. Sen. 225; *Macnamara v. Dillan*, L. R. 11 Ir. 29, etc. The words limiting the estate of the heirs to a life estate or to a life estate without power to sell or dispose, will be rejected: *Doe d. Cotton v. Stenlake*, 12 East 515; *Hugo v. Williams*, 14 Eq. 224; *Hayes v. Forde*, 2 W. Bl. 698.

The same will be the case with words of limitation in fee or in tail, superadded to the words "heirs" or "heirs of the body." Thus a limitation to the heirs of the body of the ancestor and their heirs, or their heirs, executors, administrators and assigns forever, * * will not avail to give the heirs an estate by purchase : Theobald, 3rd ed. 314.

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MacMahon,
J.

It is said by the same author at p. 315: "Nor will words of distribution and limitation together superadded to the limitation of the inheritance prevent the operation of the rule."

It has sometimes been laid down that words of distribution and limitation together, superadded to the heirs, would make the latter a word of purchase, but the rule is now clearly settled overruling *Gretton v. Haward*, Taunt. 94; *Crumph d. Woolley v. Norwood*, 7 Taunt. 362; *Anderson v. Anderson*, 30 Beav. 209, and other cases cited by Theobald, at p. 315.

"Lord Cockburn, C. J., in *Jordan v. Adams*, 9 C. B. N. S. 483, at p. 497, thus sums up the law with reference to the extent of the application of the rule in *Shelley's Case* where the word "heirs" or "heirs of the body" are used: "No incident superadded to the estate for life, however clearly shewing that an estate for life merely and not an estate of inheritance was intended to be given to the last donee, nor any modification of the estate given to the heirs, however plainly inconsistent with an estate of inheritance, nor any declaration however express or emphatic of the deviser, can be allowed, either by inference or by force of express direction, to qualify or abridge the estate in fee or in tail as the case may be, into which upon a gift to a man for life with remainder to his heirs or the heirs of his body the law inexorably converts the entire devise in favour of the ancestor."

In *Peterborough Investment Company v. Patterson*, 13 O. R. 142, and 15 A. R. 751, it was held that from the peculiar wording of the testatrix's will in that case she intended that the estate should be entailed on the children of her son and daughter-in-law Alexander and Mary

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J.

Patterson; and in order to carry out such intention the Court held they—the son and daughter-in-law—took only a life estate by entireties and their children an estate tail in severalty. Wilson, C. J., in the Court below, at pp. 147, 148, pointing out the rule of law that in construing wills the general intent will yield to the particular intent says: “if there be superadded words or expressions shewing what the particular intent of the testator was, and if that intent *can be lawfully carried out.*” And also “that every part of the will shall be given effect to, *so far as the law will permit but no further*, and that no part will be rejected, except what the law makes it necessary to reject.”

In *Smith v. Smith*, 8 O. R. 677, where there was a devise to J. S. for the term of his natural life, and if he should leave a lawful heir or heirs then the said lands should be divided equally amongst them, the learned Chancellor held that J. S. took a life estate only, the testator having himself interpreted the words “lawful heir or heirs” to mean child or children by declaring that the farm was to be divided amongst them at the death of their father. But in that case the devise did not, according to the Chancellor’s judgment, create an estate in fee or in tail under the rule in *Shelley’s Case*.

In *Dickson v. Dickson*, 6 O. R. 278, where the will was made in 1866 the devise was to the plaintiff and his heirs and executors forever of a parcel of land subject to the proviso, “That he neither mortgage nor sell the place, but that it shall be to his children after his decease.” The plaintiff had children living at the date of the will.

The learned Chancellor in his judgment gave three possible constructions: (1) An estate in fee in the plaintiff, but subject to be defeated by executory limitation to his children after his decease if they survived him. (2) By rejecting the earlier technical words “to his heirs” as being used ignorantly or in misapprehension of their effect which would cut down the first devise to an estate for life only, and would vest the remainder in fee in the children as tenants in common. (3) To intercalate a life

estate of the children between an estate for life in the plaintiff and the ultimate remainder in fee vested to him by the first words of the will. Judgment.
MacMahon,
J.

The inclination of the Chancellor was that the last was the preferable construction.

Smith v. Smith; *Sweet v. Platt*, 12 O. R. 229; *Re Chandler*, 18 O. R. 105, and *Dickson v. Dickson*, were cited in the argument as authorities that under the will in the present case Nelson Meyers only took a life estate. But the language of the will, according to the view of the learned trial Judge, and in my own opinion, shews that Nelson took an estate in fee under the Rule in *Shelley's Case*; and I do not think the words in the latter part of the clause are of that decisive character by which that estate can be cut down or in anywise impaired.

It is a rule of the Courts in construing written instruments, that when an interest was given or an estate conveyed, in one clause of the instrument in clear and decisive terms, such interest or estate cannot be taken away or cut down by raising a doubt upon the extent and meaning and application of a subsequent clause, nor by reference therefrom, nor by any subsequent words that are not as clear and decisive as the words of the clause giving that interest or estate: *Thornhill v. Hall*, 2 Cl. & F. 22. See also *Kerr v. Baroness Clinton*, L. R. 8 Eq. 462, at p. 465.

The other question to be decided is whether the restraint against alienation by Nelson Meyers during his lifetime is valid; or whether it is such a restraint upon alienation when added to a devise in fee as renders it void for repugnancy.

In *Smith v. Faught*, 45 U. C. R. 484, there was a devise in fee the devisee being restrained from selling or causing to be sold the above named lot or any part thereof during her natural life, but she should be at liberty to grant it to any of her children whom she should think proper. The restraint upon alienation was held valid. But it was also held that the giving of a mortgage by the devisee was not a violation of the restraint.

Judgment. In *Earls v McAlpine*, 27 Grant, 161, the devise was to the two sons of the testator with a restraint on alienation during the life of testator's widow. Blake, V. C., held the restraint valid, and the Court of Appeal affirmed the judgment in 6 A. R. 145.

MacMahon,
J.

In *Re Weller*, 16 O. R. 318, where the devise of lands was to a married woman with a proviso that she should not alienate or incumber them until her sister should arrive at the age of 40 years Armour, C. J., held the restraint was valid. See also *Pennyman v. McGrogan*, 18 C. P. 132; *Re Winstanley*, 6 O. R. 315.

The last case in our own Courts is *Re Northcote*, 18 O. R. 107, where the testator devised land in fee to his son subject to this express condition that he should not sell or mortgage the land during his life, but with power to devise the same to his children as he might think fit in such way as he might desire. Boyd, C., held that the case was governed by *Re Winstanley*, and that the property was not clothed with a trust in favour of the children, but the devisee took it in fee simple with, however, a valid prohibition against selling and mortgaging during his life.

Having regard to the decisions in *Smith v. Faugh* and *Re Northcote*, I think the restraint upon alienation by "sale" during the life time of Nelson Meyers must be regarded as a valid restraint. But it is only against an alienation by "sale" that the will provides; and, therefore, does not include alienation by mortgage, will, lease, exchange, etc.

The legacies subject to which Nelson Meyers takes the estate, and which legacies are to be paid within three years from the testator's death, constitute a charge upon the land: *Earls v. McAlpine*, 6 A. R. 145, per Patterson, J. A.; *Metcalf v. Hutchinson*, 1 Ch. D. 591; *Preston v. Preston*, 2 Jur. N. S. 1040.

Jessel, M. R., in giving judgment in *Metcalf v. Hutchinson*, in dealing with the question of directions in a will to pay debts, etc., at p. 594, says the rule is "that where there is a trust to pay, or to raise and pay, or to raise or

pay gross sums out of rents and profits, that means out of the estate. * * The gross sum can only be paid in the case of sale or mortgage, and therefore if the testator says out of rents and profits he means out of the estate. That is the rule, and it is a very intelligible one.”

Judgment.
MacMahon,
J.

There is, I conceive, no difference between the expression “rents and profits” and the expression used here “rents and income.” And as Nelson Meyers by the terms of the will could not “sell” for the purpose of meeting the legacies, he was entitled to mortgage the fee which he took under the will.

The objection urged against the will as being a violation of the rule against perpetuities appears to me as most formidable.

The land is to be sold, but not during Nelson Meyers’ life and not after his death until the “youngest child then living is of the full age of 21 years, and it is to be sold within three years after Nelson Meyers’ youngest child is of the full age of 21 years, providing Nelson Meyers is dead. The proceeds received from the sale of this land to be equally divided between Nelson Meyers’ children at the *time of the sale*.”

A limitation by way of executory devise is void as too remote if it is not to take effect until after the determination of one or more lives in being and upon the expiration of 21 years afterwards: *Cadell v. Palmer*, 1 Cl. & F. 372; Theobald, 3rd ed., 396.

There is no gift of the land to the children of Nelson Meyers. They take nothing until there is a sale of the land which cannot be until after the double event of their father’s death and the youngest child living at the death of the father having reached the full age of 21 years. And such sale can take place at any time within three years after such child is of the full age of 21 years. So that in the event of a child being born on the day of Nelson Meyers’ death, under the terms of the will a longer period than 21 years from a life in being (Nelson Meyers’

Judgment. life) must necessarily elapse before the intended executory
 MacMahon, devise in favour of the children could take effect.
 J.

The interest must vest in the parties entitled within the period limited by the rule. Here there is no possibility of its vesting should a child be born the day Nelson Meyers dies, because the land is not to be sold until after Nelson Meyers' youngest child is of the full age of 21 years.

Not only must the title become vested within the prescribed period but the shares in which different persons are to take the property must also be ascertained, otherwise the gift will be void for remoteness: *Challis on Real Property*, 149, citing *Curtis v. Lukin*, 5 Beav. 147; *Blight v. Hartnoll*, 19 Ch. D. 294.

In *Leith's Williams*, p. 240, it is said: "This additional term of 21 years may be independent or not of the minority of any person to be entitled; and if no lives are fixed on then the term of 21 years only is allowed. But every executory estate which might, in any event, transgress this limit, will from its commencement be absolutely void. * * When a gift is infected with the vice of its possibly exceeding the prescribed limit, it is at once and altogether void both at law and in equity. And even if, in its actual event, it should fall greatly within such limit yet it is still as absolutely void as if the event had occurred which would have taken it beyond the boundary." See the cases there cited.

In my opinion the judgment of my brother Street holding that Nelson Meyers took an estate in fee in the lands should be affirmed; but that that part of his judgment holding that there is a trust in favour of Nelson's children should be reversed.

The devisee, Nelson Meyers, was by the terms of the will restrained from alienating the land by sale; but such restraint does not, I consider, extend to an alienation by mortgage, will, etc.

The executory devise in favour of Nelson Meyers' children I consider void as a violation of the rule against perpetuities.

The motion of the plaintiff Nelson Meyers will be absolute to vary the judgment of Mr. Justice Street has here-
before stated.

Judgment.
MacMahon,
J.

The costs of all parties to be paid out of the estate.

GALT, C. J., concurred.

[COMMON PLEAS DIVISION.]

RICHARDSON V. CANADIAN PACIFIC RAILWAY COMPANY.

Railways and railway companies—Common carriers—Carriage of goods—Warehousing—Termination of liability—Privity of contract.

Under a condition in a railway shipping bill the delivery of goods was to be considered complete and the responsibility of the company to terminate when the goods were placed in the company's warehouse at their destination.

The goods were carried to the station at the place of delivery and were placed in the company's shed there used for the purpose of storing goods, where they were subsequently destroyed by fire. The station was some five miles distant from the village where the plaintiff's place of business was :—

Held, that the station was the destination of the goods and not the village : that the shed was a warehouse within the meaning of the condition ; and that after the goods were placed there the company's liability was at an end.

Goods were sent by another railway company and were carried by it to its crossing point with defendants' line when the goods were delivered over to defendants to be carried to the plaintiff :—

Held, that an action for the loss of the goods was not maintainable by plaintiff against defendants as there was no privity of contract between them.

THIS action was brought to recover the value of several consignments of goods which were consigned to the plaintiff, a merchant carrying on business at Flesherton.

At the trial only three of the consignments were in dispute.

One of the consignments consisted of goods of the value of \$326.22, delivered by Mills & Hutchison, merchants, at Montreal, to the defendants at Montreal, to be carried and delivered to the plaintiff at Flesherton. Another consignment consisted of groceries, of the value of \$11.25, delivered by Warren Bros. of Toronto, to the defendants

Statement. at Toronto, to be also so carried and delivered. The third package consisted also of dry goods of the value of \$132.99, delivered by James Turner & Co. of Hamilton, to the Hamilton and North Western Railway Company at Hamilton, to be also so carried and delivered. The Montreal goods duly arrived at Toronto, and were forwarded with the Toronto goods on the regular freight train leaving Toronto at 6.30 a.m., on the 21st of January, 1888, reaching Cardwell Junction at 11.30, and together with the Hamilton goods, which had been carried by the Hamilton and North Western Railway, and there delivered over to the defendants to be carried on to the plaintiff—the crossing point of the Hamilton and North Western line being there—were forwarded to Flesherton, reaching the station there between three and four o'clock in the afternoon. On the arrival of the goods they were placed in the defendants' baggage room or warehouse where they remained till the night of the 24th of January, when the warehouse, having been destroyed by fire, the goods were lost.

The bill of lading or shipping bill given by the respective railways was similar in form and was subject to the following conditions, amongst others :

Condition 5, (set out in the judgment of ROSE, J.)

Condition 10.—"That all goods addressed to consignees at points beyond the places at which the company have stations, and respecting which no direction to the contrary shall have been received at those stations, will be forwarded to their destination by public carrier or otherwise, as opportunity may offer, without any claim for delay against the company for want of opportunity to forward them ; or they may, at the discretion of the company, be suffered to remain on the company's premises, or to be placed in a shed or warehouse [if there be such convenience for receiving the same] pending communication with the consignees, at the risk of the owners as to damage thereto from any cause whatsoever. But the delivery will be considered complete, and all responsibility of the company shall cease when such other carriers shall have received notice that said company is prepared to deliver to them the said goods for further conveyance ; and it is expressly declared and agreed that said Canadian Pacific Railway Company shall not be responsible for any loss, mis-delivery, damage, or detention that may happen to goods sent by them, if such loss, mis-delivery, damage, or detention occur after the said goods arrive at said stations, or places which they are consigned to, or beyond their said limits."

The action was tried before ROSE, J., without a jury, at Statement.
Toronto, at the Spring Assizes of 1889.

The learned Judge delivered the following judgment in which the additional facts are stated :

ROSE, J.:—This action was brought to recover the value of several consignments of goods—three only, however, being in dispute in this case—one from Hamilton, which was carried by the Hamilton and North Western Railway Company to its terminus, or rather to a crossing point, Cardwell Junction, I think, and there delivered to the defendant company, to be carried by the latter to Flesherton Station; another from Toronto, delivered to the defendant at Toronto to be carried to Flesherton; and the third from Montreal, delivered to the defendant to be carried to Flesherton.

The bills of lading were produced and were subject to conditions.

The action was laid, in the statement of claim, against the company as a common carrier, and the case was opened, and evidence given, and the case closed upon proving the contract to deliver, and an admission of non-delivery to the plaintiff.

Some question arising as to the form and effect of the admission, the plaintiff called evidence to shew what took place at the point of destination, namely, at the station of Flesherton; and there was a contest as to whether or not actual notice or knowledge by the plaintiff was shewn.

The plaintiff took the position, with regard to the Hamilton consignment, that there was no condition binding upon the plaintiff—the conditions upon the contract with the Hamilton and North Western shewing that there was an end of liability after the goods had reached the terminus, or junction of that line with that of the Canadian Pacific Railway at Cardwell Junction; and to that the answer was given, by the defendant there was no privity of contract between the plaintiff and the defendant.

Judgment.

Rose, J.

With regard to that, an offer was made by the defendant's counsel that this consignment should be treated the same as the others.

This offer was not accepted, and as to that, each party stood upon their strict legal rights.

When the goods arrived at Flesherton station, which was on Saturday, the 21st of January, they were unloaded from the car and placed in the baggage room or warehouse of the defendant, and there remained until the night of Tuesday, the 24th, when—the station house being consumed by fire—they were destroyed. On Saturday morning the book-keeper of the plaintiff went to the station, and there settled for the freight on other goods then in store, and during that day they were removed, with the exception of a consignment of salt.

Some question arose as to when certain coal oil, which was subsequently taken away, was received, and as to what communication passed between the station master and the manager and book-keeper of the plaintiff on that day—on Saturday, the 21st. On the following Monday nothing was done by either party with respect to these goods. On Tuesday morning, the carter (one Lawrence) employed by the merchants of the village to go to the station and carry their wares from the station to the town, about a mile and a half distant, and whose duty it was, apparently, under instructions, to enquire for goods, and if he found them there to take them to the owners, they either first paying the freight or he taking the freight bill with the goods and bringing back the charges on the goods to the station master, went to the station. He did not call at the station on Monday, because he was away at a funeral, but apparently his custom, if not his duty, was to enquire frequently, if not from day to day. On Tuesday morning he attended—not with any specific instructions in regard to these goods or any other goods, except it might be as to the salt and coal oil then there, and which belonged to the plaintiff.

What then took place is in dispute. He says he received certain information from the baggage master which conveyed to his mind the impression that there were goods there belonging to the plaintiff; and I think the fair result of his evidence is, as to the impression he obtained, that the goods were other goods than the salt and coal oil, and that the goods were in the baggage room.

Judgment.

Rose, J.

The evidence of the baggage master, if received without any qualification, is that he told him that there were other goods there, and questioned him as to when he would take them away, whether he would remove them before taking away the salt and coal oil. However that may be, certain it is that, upon receipt of the information he went to the office, saw the station master and made inquiries of him in respect of goods, and was given a freight bill for coal oil, and was told it ought to have been taken away earlier.

It appears that the station master had been communicating with the plaintiff earlier than the Saturday about the coal oil, to have it removed at once, as he did not wish to have it standing near the station in a car on the track.

Whether or not Lawrence, on that Tuesday morning, received other freight bills than that for the coal oil, is a matter to be decided. I am not able to satisfy my own mind that he did; and, as the onus is upon the defendant I must find that he did not receive other than the freight bill for the coal oil. I must confess my mind is not altogether free from doubt, but I cannot arrive with any certainty at the conclusion that he did receive it; I shall, therefore, treat the case as if he had only received the freight bill for the coal oil. He then went about his business and delivered the coal oil. Whether his mind was satisfied on receiving the freight bill for the coal oil, or whether there was some pressure in regard to the coal oil, and removing it at once, it appears to me that no enquiry was made with regard to these specific goods.

I think I must find, as a fact, that the plaintiff had received invoices of the goods some time before the fire--

Judgment.

Rose, J.

possibly on the Monday, and it is possible one on the Saturday, from Warren Brothers; but certainly on the Tuesday morning. I think the fair inference of fact is, he received the invoices of goods, of the three consignments in question.

If it be necessary that notice should have been given to the plaintiff, the case would turn upon very close questions of fact, and perhaps of law.

I have gone through the many cases cited as to the necessity for giving notice. I find it is laid down in American text books that there is no English case in which the railway company has been held free from liability to give notice; and *Mitchell v. Lancashire & Yorkshire R. W. Co.*, L. R. 10 Q. B. 256, was referred to—see page 260.

It was contended by Mr. Thompson, for the plaintiff, that it was the duty of the common carrier, the railway company, to give notice, to free itself from liability.

Bourne v. Gatcliffe, 11 C. & F. 45, cited in *Mitchell v. Lancashire and Yorkshire R. W. Co.*, is the case which has been relied upon chiefly for that doctrine. That was the case of a ship. It is clear that in the case of a ship, where the time of arrival is uncertain, and where the consignee may not know with any degree of certainty when the vessel may arrive, the duty of the carrier is to give notice.

I have also looked at Hutchison on Carriers, and at Schuyler's Law of Bailments. The judgments on the point of notice vary in the different States—some go in one direction, and some in the other.

Having regard to the various cases, and after carefully analysing the different authorities cited—and referring more particularly to the case of *Chapman v. Great Western R. W. Co.*, 5 Q. B. D. 278, I have come to the conclusion that the principle of law which must govern is this—that the consignee must have a reasonable time within which to take away the goods, and that reasonable time begins from notice or knowledge; what is notice or knowledge turns on the facts in each case, the custom of the carrier, and the practice of the party or consignee.

It is laid down in the case of *Chapman v. Great Western R. W. Co.*, (the principles of which govern this case) that if notice by the carrier to the consignee is not absolutely necessary, there must be knowledge by the consignee of the date of the arrival of the goods, or such facts must exist as would charge him with neglect if he had not knowledge—and that time begins from knowledge either actual or imputed.

Judgment.
R

The case of *Chapman* is very like this in many respects: There the consignee knew when the goods were coming; I think the consignee in this case knew with reasonable certainty when the goods would arrive, although probably not the exact day or time. There the consignee went more than once to enquire about the goods; and there no question was raised as to the duty of the carrier to give notice to the consignee; but here the custom was for the consignee, the plaintiff, and other merchants in Flesherton if not to make personal enquiry, at least to make enquiry through Lawrence, who I think was their agent for the purpose, being employed by them and for them in enquiring as to the arrival of goods at Flesherton Station consigned to Flesherton merchants. Nothing took place on Monday or Tuesday; but if enquiry had not been made by Lawrence on either of these days, I think I should have been bound to hold, on the authority of the *Chapman Case*, that reasonable time had elapsed from the time of the receipt of the goods, and from the time the plaintiff ought to have had notice of their arrival; and that the defendant was discharged from its duties and liabilities as a common carrier by reason of the neglect of the plaintiff to make enquiry for the goods, either by himself or through Lawrence. But Lawrence did, in fact, make enquiry; and the question in my mind, which I am not able to solve with any certainty, is whether or not Lawrence did not receive such information as placed the duty of further enquiry upon him, or whether the receipt by him of the freight bill for the coal oil was such as to reasonably satisfy his mind that that was the freight which the baggage

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Rosr J

master had referred to, and that, therefore, he was misled by the station master.

In the further history of this case the question may receive further consideration.

I think that the case of *Collins v. Bristol and Exeter R. W. Co.*, 7 H. L. 194, is clear and conclusive authority as to the goods shipped from Hamilton, that the plaintiff cannot recover.

Mr. Thompson endeavoured to distinguish this case from the other cases which were referred to, and which were relied on by the defendant company, as justifying the contention, (and I might refer to the case of *McMillan v. Grand Trunk R. W. Co.*, 15 A. R. 14,) by saying that there was evidence here that there was not one rate of freight under which the goods were carried. I think the duty was upon the plaintiff to shew if there were different rates; and reading the contract, I think there is no distinction, in law, between the words in this contract and the contract in *Collins v. Bristol and Exeter R. W. Co.* Mr. Justice Patterson, in *McMillan v. Grand Trunk R. W. Co.*, quotes *Bristol and Exeter R. W. Co.* as clearly applicable to a contract similar to the one in question.

I therefore hold there was no contract between the plaintiff and the defendant company in regard to the Hamilton goods, and that the liability on that contract was the liability of the Northern and North Western Railway Company, and as to it the plaintiff must fail. And there is the authority of very strong opinion—the opinions of very strong and able Judges in *Collins v. Bristol and Exeter R. W. Co.*—that in a contract made by the defendant company, a contract extending to the carriage of goods beyond its own line, the defendant company could have availed itself of the conditions.

As to the other two consignments, it is clear, upon the case to which I have referred, and *Shepherd v. Bristol and Exeter R. W. Co.*, L. R. 3 Ex. 189, that the liability of the common carrier may be limited, to any degree and in any respect, both as to time and amount by con-

tract. I have, therefore, to find whether or not there is a contract here which limits liability.

Judgment.

Rose, J.

It seems to me the common law liability of the carrier is to continue until a reasonable time after the arrival of the goods and notice to the consignee. There is a clear distinction between passenger luggage and freight. In the former the passenger has notice of the arrival. In that respect the consignee stands on a different footing as to fact, and I find as to principle.

In regard to both these consignments, condition 5 provides: "In all cases where herein not otherwise provided, the delivery of the goods shall be considered complete and the responsibilities of the company shall terminate when the goods are placed in the company's sheds or warehouse (if there be convenience for receiving the same) at their final destination; or when the goods shall have arrived at the place to be reached on the said company's railway. The warehousing of all goods will be at the owner's risk and expense; and if the company are unable to store or warehouse goods received by them they shall have the right to place such goods in any warehouse that may be available, at the risk and expense of the owner of the property so stored, and all charges for storing, warehousing, and conveyance, shall form an additional lien on said goods."

Mr. Thompson argued that this baggage room was not a warehouse within the conditions, and that the duty cast upon the company had not been discharged when the goods were placed in that room.

It certainly appears to have been made use of for that purpose. But the question is,—Had the goods arrived at their destination? I think the baggage room was a warehouse within the conditions, and I think the goods had arrived at their destination. I do not think there was any duty undertaken by the company to deliver goods beyond the station, and that Flesherton in the contract means Flesherton station and not the village; the consignee accepted the duty of taking the goods from the station to

Judgment.

Rose, J.

the village; I think, therefore, the goods had arrived at their destination. It seems to me that the effect of that is, that the contract under which the company assumed the liability of common carriers has been limited; and, as pointed out in some of the cases, the liability may be limited as to certain goods; in this case the liability seems to me to have been limited as to the time when the goods arrived at their destination.

The duty of the common carrier ceased when the goods were removed from the car to the warehouse. I think this is in accordance with the lines laid down in *Schuyler*, and given effect to in many of the States of the Union.

I have referred to the judgment in *Collins v. Bristol and Exeter R. W. Co.*, and also to the judgment of Mr. Justice Osler in the case of *McMillan v. Grand Trunk R. W. Co.*—there condition 10 was held not to apply to point of destination, but the reason which went to shew the condition 10 not to apply in that case seems to me to apply to make condition 5 binding in this case.

I think the liability of common carrier ceased when the goods were placed in the warehouse, and from that moment the character of the company was changed from that of a common carrier to that of a warehouseman.

The statement of claim was framed against the defendant company as a common carrier, and evidence was given in that view. By the replication to the defence of the railway company, setting up the conditions, the plaintiff set up that the defendant company was not entitled to take advantage of the conditions by reason of the goods having been destroyed by negligence.

I think that was not at all a reply to the plea, because if the liability of the defendant had ceased by reason of the change from its custody as carrier to that of warehouseman, it clearly follows that the liability for the negligence of the carrier had ceased, and subsequent negligence did not change the liability from that of warehouseman to that of carrier.

There was no application to amend the statement of

claim, so as to claim against the defendant company as warehouseman; nor do I undertake to pass upon the question whether such an application would have been successful, because Mr. McCarthy, on behalf of the defendant company, said he had not come prepared to meet such a case.

Judgment.

Rose, J.

I do not think it would be reasonable, on this record, to require the company to meet such a condition of affairs, but as was said in two of the cases, *Vineberg v. Grand Trunk R. W. Co.* (13 A. R. 93), and *McMillan v. Grand Trunk R. W. Co.*, it is still open to the plaintiff to seek such remedy. I do not think it is fair, where the plaintiff comes down with a statement pointing in one direction to allow, by replication, a wholly different case to be brought, except upon a formal application to amend to set up a new cause of action, and upon such terms as appear just and reasonable, having regard to the rights of the parties. I think the record must be treated in all cases as the specific statement of the causes of action when the result will be to shew the plaintiff's grounds in respect to each of the causes of action, and then there can be judgment as to each.

The defendant paid into Court, or to the plaintiff, a sum of money pending action. Unless there is something urged to the contrary, I think the plaintiff must have the costs of his action occasioned by the amount so paid in—up to that date the defendant must have its costs of action.

In Michaelmas Sittings, 1889, *D. E. Thompson* moved on notice to set aside the judgment and to enter the judgment for the plaintiff.

In Hilary Sittings of the Divisional Court (composed of GALT, C.J., ROSE and MACMAHON, J.J.), February 13th, 1890, *D. E. Thompson* and *George Bell* supported the motion.

McCarthy, Q. C., and *Angus MacMurchy*, contra.

Judgment. March 8, 1890. GALT, C. J.:—

Galt, C.J.

This case was tried before my brother Rose without a jury. After reserving the case for consideration my learned brother has given a carefully considered judgment in which he has set forth all the facts, and expressed his opinion on the law bearing on them. After the learned argument of counsel on both sides and after a careful consideration of the evidence and authorities, I fully concur in the judgment expressed by my brother Rose. It is therefore unnecessary to do more than state that in my opinion the motion must be dismissed with costs.

ROSE and MACMAHON, J.J., concurred.

[COMMON PLEAS DIVISION.]

HAGARTY V. BATEMAN.

Voluntary conveyance—Transaction improvidently carried out and without professional advice—Setting aside.

One of the plaintiffs was the owner of a farm valued at about \$4,500, and being, as was also his wife, old and feeble and incapable of doing much manual labour, and also illiterate, negotiated with the defendant, the wife's nephew, a young man, with the object of effecting an arrangement for their support and maintenance. The defendant without permitting the husband plaintiff to obtain independent advice induced him and his wife to execute a deed to defendant, the latter giving them back a life lease. The consideration in the deed was natural love and affection, \$1, and the life lease. The habendum and covenants for quiet enjoyment were made subject to the lease and the covenants therein. The annual rental in the lease was \$1 with a covenant for quiet enjoyment, and a special covenant by defendant to support and maintain the plaintiffs, on performance of which he was to have the proceeds of the land. The defendant was also to pay \$30 in cash yearly, and provide plaintiff with a horse and vehicle and house room. On failure by defendant to perform such provisions plaintiffs were to have the proceeds of the land on giving defendant two months notice in writing, and if the default still continued plaintiffs were to be at liberty to take steps to eject defendant. The deed did not contain any power of revocation in case of defendant's default :—

Held, under the circumstances, the deed and life lease must be set aside.

THIS was an action tried before FALCONBRIDGE, J., with- Statement.
out a jury, at the Belleville Spring Assizes, 1889.

The action was brought by William Hagarty and Eliza Hagarty, his wife, against Caleb Bateman, a farmer, in the township of Rawdon, in the county of Hastings.

The plaintiff, Wm. Hagarty, was the owner in fee free from encumbrance, of the east half of lot 2, in the 7th concession of Rawdon, containing 100 acres, which he alleged was worth \$6,000.

It was alleged in the statement of claim, that the plaintiffs were, at the time of the transaction now impeached, old and feeble, and unable to take care of themselves, and that the defendant, well knowing their weakness and infirmities, offered to take the said land, and in consideration therefor that he would support and maintain the plaintiffs for the term of their and each of their natural lives, in a manner suitable to their condition in life, and that he would

Statement.

provide them and each of them with proper and sufficient food, clothing and medical and other attendance, together with a dwelling to reside in, and a conveyance to go and come as they might choose, and such other necessities as they might require; and the plaintiffs consented to such arrangement, and in order to carry it out the plaintiffs executed a deed of the said land to the defendant, and the defendant executed and delivered to the plaintiffs a life lease of said premises at a nominal rent and containing covenants on the part of the defendant as above set forth, the said deed and life lease bearing date the 12th of August, 1886.

It was also alleged in the said statement of claim, that, amongst other things, it was provided by the life lease that so long as the defendant performed his said agreement and covenants towards the plaintiffs, that the defendant should have the total proceeds of the lands, but upon default being made in the performance of the same, that the plaintiffs, or either of them, might eject the defendant from the premises after notice; and it was distinctly understood and agreed between the parties that upon such default being made the deed and life lease should be null and void, and the plaintiffs should have reverted to them their former estates in the said lands, but by inadvertence and error such provision was omitted from the deed and life lease: that defendant went and lived upon the farm and still lived there, and had taken the total proceeds thereof; but that the defendant soon began to be neglectful of the plaintiffs, and they remonstrated with him, and finally served a notice of ejectment upon him in accordance with the agreement; and the defendant for a little treated them better, but soon began again to neglect them, and that plaintiffs thereupon served a second notice with the same result as before: that after service of the second notice the defendant neglected and illtreated the plaintiffs, and that the plaintiff Eliza Hagarty became ill and the plaintiff Wm. Hagarty though old and feeble was obliged to nurse her, and the defendant still continued his neglect and used abusive language towards the plaintiffs: that the plaintiffs, in consequence of

the defendant's neglect and refusal in breach of his covenant, ^{Statement.} were compelled to procure food and clothing of various kinds, and have been obliged to go without some of the necessaries required for their comfort and convenience.

The plaintiffs also alleged that they were ill-treated, and that they executed the deed and life lease without consideration, and entered into the agreement improvidently and without independent advice; and that the defendant, by not having the deed and life lease contain a power of revocation at the will of the plaintiffs, as the plaintiffs believed they did contain, took an undue and improper advantage of the plaintiffs; the plaintiffs served a notice as contemplated by the agreement and as provided by the life lease more than two months prior to the commencement of the action; and that the defendant had by his neglect and non-performance of the covenants made the deed and life lease null and void.

The plaintiffs claimed ownership of the farm as of their first and former estate, and prayed that the deed and life lease might be declared void and be ordered to be delivered up to be cancelled, or that the defendant might be ordered to pay a certain annual sum to the plaintiffs to be fixed by the Master at Belleville, in lieu of their support and maintenance, for their natural lives, together with the use of the house and stabling of a horse and necessary vehicles, and their costs of suit.

The statement of defence set up that the plaintiffs sought out the defendant and asked him to take a deed of the place and work it, and the whole agreement was reduced to writing and signed by the parties, and that the writing contained no such item as set out in the fifth paragraph of the statement of claim; and the defendant pleaded the Statute of Frauds in answer to any alleged verbal agreement; and that he also, to the best of his ability, performed the said agreement, and denied he had not performed the same; also that the plaintiffs were determined not to be satisfied and made unreasonable demands on him; and that he procured servants to work for and wait upon the plaintiffs.

Statement.

who drove such servants away; and also that the plaintiff Wm. Hagarty used offensive and insulting language to the defendant with the object, as the defendant believed, to make his life upon the said farm unbearable. The defendant likewise alleged he was desirous of carrying out and performing the said agreement according to the true intent and meaning thereof.

The learned trial Judge, at the conclusion of the plaintiffs' case said: "I do not think any case has been made out for cancellation."

In his considered judgment he stated: "After much consideration I have come to the conclusion that I would be justified in declaring the deed and life lease void for improvidence and want of professional advice; but I prefer to grant the alternative relief sought by the statement of claim. I therefore order the defendant to pay to the plaintiffs, and the survivor of them, a certain annual sum to be fixed by the Master at Belleville in lieu of their support and maintenance, together with the use of the main building and horse, and vehicle, and provision therefor as set out in the life lease.

I give no costs up to this judgment because I do not find any case of actual fraud or moral wrong established against the defendant, and while adequate provision may not have been always made for the plaintiffs, there is evidence that they were sometimes exacting and unreasonable."

The plaintiffs moved on notice to vary the judgment of the learned Judge, and to set aside the deed and life lease, as entered into improvidently:

During Hilary Sittings of the Divisional Court (composed of GALT, C.J., and MACMAHON, J.), February 13th, 1890, *E. G. Porter* supported his motion, and referred to *Lavin v. Lavin*, 27 Gr. 567, 572-4; *Beeman v. Knapp*, 13 Gr. 398; *Hume v. Cook*, 16 Gr. 84; *Irwin v. Young*, 28 Gr. 511; *Mason v. Seney*, 11 Gr. 447, 450; *Shanagan v. Shanagan*, 7 O. R. 209; *Sheldon v. Sheldon*, 22 U. C. R. 621; *Demorest v. Miller*, 42 U. C. R. 56, 64; *Widdifield*

v. *Simons*, 1 O. R. 483; *Waters v. Donnelly*, 9 O. R. 391, Argument. 402-3; *Sheard v. Laird*, 15 O. R. 533; *Huguenin v. Baseley*, 2 W. & T. L. C., 6th ed., 597.

Moss, Q. C., contra, referred to *Harrison v. Guest*, 6 DeG. McN. & G. 424, 432, 8 H. L. Cas. 481; *Toker v. Toker*, 31 Beav. 629; *Re White*, 22 Gr. 547, 24 Gr. 224; *Sheard v. Laird*, 15 A. R. 339.

March 8, 1890. MACMAHON, J.:—

At the time the deed and life lease were executed in August, 1886, the plaintiff Wm. Hagarty was about 70 years old, and some years prior thereto had lost one of his hands so that he was incapacitated from doing much manual labour on his farm. The plaintiff Eliza Hagarty was at that time 63 or 64 years old. So far as appears the plaintiffs have no family.

The farm in question was occupied by the plaintiffs since 1837, and has a dwelling house of stone built thereon, and, from the evidence, would be of the value of \$4,000 or \$4,500.

The defendant is a young man and a nephew of Eliza Hagarty, and owned a farm a short distance from the plaintiffs, but his house being destroyed by fire a short time prior to August, 1886, he was in August living at a village called Springbrook, seven miles from the plaintiffs.

About two weeks prior to the deed being executed the plaintiffs met Wm. Bateman, the defendant's brother, at Stirling, and they made overtures through him to the defendant that as the latter's dwelling had been destroyed he should come and live on their (the plaintiffs') farm.

The plaintiff William Hagarty's evidence of what took place at Stirling is as follows:

Q. "Who met his brother at Stirling?" A. "My wife and me. She told him if he wanted to come to live we would give him a chance; we would give him the place to take care of us as long as we lived."

Eliza Hagarty's account of what took place was:

Q. "What did you say to Wm. Bateman?" A. "I said that if he" (meaning the defendant) "came and took care of us we would give him

Judgment. the place after our death." Q. "That if he would come out and keep you and maintain you you would give him your place after your death?" A. MacMahon, "Yes." Q. "Was that all that occurred at that time?" A. "That J. was all."

Wm. Bateman said that the plaintiffs wanted him to take the farm, and then said to tell his brother Caleb and they would give him a deed of the place to support them. He saw Caleb the next day and told him what the plaintiffs desired.

The defendant says that a short time prior to the plaintiffs speaking to his brother William that he had been at John Potter's, his brother-in-law's, and that the plaintiffs then wanted him (Caleb) to go out and take their place and keep them while they lived, but that he refused, saying that he had enough land of his own.

A few days after the conversation between the plaintiffs and Wm. Bateman at Stirling the defendant went to the plaintiffs' house and they told him what they wanted him to do, viz.: they would give him a deed and take a life lease, but no agreement was come to on that occasion. Another day was appointed for the defendant to come out, which he did a few days afterwards, bringing his wife with him, when the plaintiffs and the defendant and his wife left in the carriage together to have the papers drawn and executed evidencing the contemplated agreement, for during the first interview no agreement appears to have been arrived at, and there is nothing to show that on the second occasion the question had been discussed between the parties.

There is no doubt the plaintiffs intended when starting to go to Stirling and have the documents drawn by a lawyer by whom they could be advised. Both plaintiffs say that this was the intention, and the defendant and his wife admit that when starting out the intended destination was Stirling.

The defendant said in his examination :

"Q. How did you come to Springbrook? A. They spoke about fetching Mr. Cook. I think Mrs. Hagarty said that she had heard I said something, and she wanted to fetch Mr. Cook with her. Q. Was any-

thing said about going to Stirling? A. Well, that is where we were calculating to go only they spoke about Mr. Cook. Q. When Mr. Cook was spoken about, what was agreed upon? A. I drove right to Mr. Cook's, to the turn up to his house, and I was driving on up and they asked me where I was going. I said I was going on after Mr. Cook; they said maybe he would not be home; I said it would not take long to go and see, and I started to go again, and they told me to drive on and not mind it."

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MacMahon,
J.

The defendant's wife gives the following account of their going to and leaving the plaintiffs and what took place on the road:

"Q. You are the wife of Caleb Bateman? A. Yes. Q. I want to fix your mind upon the day the deeds were executed; you went to Mr. Hagarty's, did you? A. Yes. Q. Drove there with your husband? A. Yes. Q. How long were you there? A. Not very long; they both got ready and went with us. A. And where did you start for? A. Well, the calculation was, as far as I know, to go to Stirling. Q. Well, why did you drive north and away from Stirling? A. Well, Uncle William spoke something—or Aunt Eliza I think it was—about Mr. Cook; she wanted to take Mr. Cook with them; then we had to go back the same way we came in order to get Mr. Cook. Q. Why didn't you get Mr. Cook? A. Caleb went to turn there and Uncle William said he would not be at home; Caleb said it would not take long to go in and see, and Uncle William said to drive on and not mind. We then went up to the town hall, and they went into the hotel. Q. When they came out was there any place decided upon going to? A. Some of them spoke about going back to Mr. Wiggins. I heard Caleb say that he did draw writings, and we went there."

The defendant says there was no bargain concluded on his first visit to the plaintiffs, and I take it that from the evidence of the defendant and his wife the bargain was not discussed at the plaintiffs' house on the second visit.

The plaintiff William thus gives his account of why they did not go to Stirling, but instead went to Springbrook, where the deed and life lease were drawn by Mr. Wiggins, and also what took place while at Wiggins':

"Q. When he came to your place the last time, that is, the time you went to get the deeds drawn, did you talk over any bargain with him? Did you yourself talk over any? A. No. Q. How long was he at your place on that occasion? A. He came there in the forenoon and we left something about noon or afternoon, I could not say which. Q. Just there a portion of the day? A. Yes. Q. Who was it proposed going some place that day? A. Well, I proposed to go to Stirling to see a lawyer about getting the writings done. Q. What did he say to that? A. He

Judgment. said that Mr. Wiggins back—was doing business, and that he would do it for us. Q. Was it before or after you had started for home that he spoke to you about going to Stirling? A. After we had started from home. Q. And he told you about Mr. Wiggins. Now, did you speak to him of seeing anybody else? A. Yes, when we were on the way I wanted to stop and we would take Mr. Cook with me. Q. Who was he? A. He was Reeve of the township for a long time; he is dead now. Q. A friend of yours? A. No, he was no relation to me. Q. But you were good friends? A. Yes. Q. What did you want to see him for? A. To see me rightified. Q. Did Bateman take you to Stirling? A. No. Q. He took you to Cook's? A. No, I wanted to go to Cook's, and then he said he thought it was no use, he thought we had best go right on; Wiggins was making a living by that, and he would do the fair thing. Q. So you got on down to Wiggins'? A. We got to Wiggins'. Q. Did you want to give Caleb Bateman a deed of your farm? A. No there was no deed spoken of till we went to Wiggins'. Q. Why didn't you want to give him a deed? A. Well, I thought I would be throwing my place away from me altogether, and I thought I would get a lease. Q. Did you say anything about that at Wiggins'? A. It was spoken over and they said the lease would be no good without a deed. Q. Who said that? A. I think it was Wiggins. Q. How many acres are there in that farm? A. There is a hundred acres in it. Q. And what would be the fair value of it? A. The day I gave it to him I would not give it for less than between five and six thousand dollars, but himself said when he got it he would not give it for six thousand. Q. The day you were at Wiggins' was there anybody there looking after your interests? A. No one at all.

Mr. Wiggins is a retired schoolmaster and acts as a conveyancer at Springbrook, and the conveyance drawn by him is dated the 12th day of August, 1886, and is an absolute deed in fee of the farm to the defendant, the consideration expressed being "natural love and affection and a life lease executed between the parties hereto and bearing even date herewith, and the sum of one dollar." The habendum in the deed makes it "subject to the life lease and the covenants therein contained and executed between the parties thereto bearing even date herewith."

The covenant in the deed for quiet possession is also "subject to the covenants contained in the life lease hereinbefore referred to, and also subject to the said life lease."

The life lease bears date the same day as the deed, and is to the plaintiffs for the term of their lives, subject to a yearly rent of one dollar. There is a covenant by the lessor for quiet enjoyment, and a proviso for re-entry by the lessor on non-performance of covenants.

Then follow these special provisions and covenants : Judgment.
“Provided that so long as the said lessor supports and MacMahon,
maintains the said lessees in a manner suitable to their J.
condition in life, and provides them with proper and sufficient food, clothing and medical and other attendance, the said lessor shall have the proceeds of the said lands to his own use. The said lessor further agrees to pay in cash \$30 to the said lessees on the 1st day of January in each and every year, first payment to be made A.D. 1888 ; and also to provide a horse and vehicle when required for the use of the said lessees ; also to feed and take care of a colt, now the property of the lessees, until sold. The said lessees hereby covenant and agree to and with the said lessor, that he the lessor shall have the use of all buildings on said premises, save and except the main building, which the said lessees reserve for their own use. But in case the lessor fails to make such provisions, then upon default the said lessees shall have to their own use all the proceeds of the said lands upon giving to said lessor two months’ notice in writing, upon the expiration of which time the lessees, or one of them, may take steps to eject the lessor if he still fails to carry out this agreement or proviso. The said lessor covenants with the said lessees for quiet enjoyment.”

The defendant and his family moved into the plaintiffs’ house shortly after the execution of the deed, and from that time until March or April in the following year the two families took their meals at the same table, at which latter period differences arose, the plaintiffs asserting that the provisions they had on hand when the defendant came there to live having been consumed by the two families the defendant neglected to provide suitable provisions for the plaintiffs, so the plaintiffs thereafter remained in their own part of the house, having their meals separate from the defendant and his family.

There is evidence that the plaintiffs purchased bread and butter and other supplies, and also some articles of clothing which, it is alleged, the defendant neglected and refused to

Judgment.
MacMahon,
J.

supply. And evidence was given on behalf of the defendant that he supplied the plaintiffs with all that could or should reasonably be required by a farmer and his wife for their proper support and maintenance.

There cannot, I think, be any question that before executing any written agreement the plaintiff desired legal advice so that his interests might have been properly protected. He says he did not want to give a deed but was told by the defendant and Wiggins that it was necessary before a life lease be drawn. That his interests were not so protected I consider is manifest from the proviso in the life lease I have copied in full. The proviso is that if the defendant supports and maintains, &c., the plaintiffs, he (the defendant) is to have the proceeds of the lands to his own use; if the defendant fails to make such provision, then, upon default, the lessees shall have to their own use the proceeds of the lands, upon giving the defendant the notice in writing required, and may take steps to eject.

There is no covenant by the defendant that he will support and maintain; and there is no power of revocation in the deed or life lease in the event of the defendant's failure to furnish proper support and maintenance.

The defendant understood his position to be that in the event of his not performing his agreement to support and maintain the plaintiffs, they were merely to have the proceeds of the land during their lives or the life of the survivor; and that is the effect of the proviso in the life lease which is referred to in the deed.

The defendant on cross-examination by plaintiffs' counsel said:

"Q. You told me in your examination before you were to have this farm whether you performed your agreement or not? A. Well, that is the way I understood it. Q. It did not matter whether you performed the agreement or not? Then it was no part of the agreement that the old people were to get the farm back in any event? A. No."

This farm was all the property owned by the plaintiffs, and they are both illiterate, for, although the female plaintiff says she can read print, the deed is executed by each of them by their mark.

There is no doubt the plaintiffs first sought the defendant with a view of eventually giving to him the farm in return for the support and maintenance they desired to procure in their declining years. But it could hardly be supposed that they contemplated immediately depriving themselves of their property without any proper security being given to them for such future support and maintenance.

Judgment.
MacMahon,
J.

Any language I might employ could not by any possibility add to the force of the observations of Mowat, V. C., in *Beeman v. Knapp*, 13 Gr. 398, where he says, at p. 400: "It is claimed to be a deed for valuable consideration, because of the proviso for the old man's maintenance; but clearly that is not the character of the instrument. The maintenance of the old man would have been an inadequate consideration for the conveyance; but the grantor had no personal security even for his maintenance, nor security of any kind beyond a mere lien for it on the land he was conveying. This lien he reserved, and subject to it the deed was a gift of the land to the grantee. As such it cannot be maintained—embracing, as it did, the whole real estate of the grantor, and very nearly the whole of his means of every kind; making no provision for his wife; and placing him at the mercy of his daughter and her husband for the maintenance he should have; a suit at law or here, with all its cares and anxieties and difficulties to an old man, and its costs, being his only remedy, and being practically in such a case no remedy at all; and the deed having been executed without the full information as to the effect and consequence of the deed, or the deliberation and independent advice necessary in the circumstances of the parties to give validity in equity to such a transaction.

Primâ facie, a conveyance of all a man's property in his old age, without any power of revocation, in consideration of a mere promise of maintenance, whether under seal or not, is extremely improvident," p. 404.

"Considering the relation of the parties, the transaction in question could only be sustained on evidence of the

Judgment. fullest information as to the possible consequences of what
MacMahon, he was doing ; and evidence of his having had competent
J. independent advice ; and of his having, in executing the
deed, acted freely and deliberately, and with full knowledge
of the position in which the transaction was placing him.

A prudent adviser would, for example, have said that, if a deed was to be executed at all, it should, at the very least, contain a power of revocation at the will of the grantor, the grantee in that case receiving, if it was so agreed, a fair compensation for what the grantor should, up to the time of revocation, have received from him ; and that such other precautions should be adopted and arrangements made, that, if maintenance should thereafter be withheld, or an inadequate maintenance be given, the grantee, his heirs and assigns, could not keep the property, leaving the old man—in his helpless feebleness and poverty—to bring suits at law from time to time for damages, or a suit here for like relief. * * A mere bond like that given by the plaintiff, viewed as a security for the peaceable, comfortable, and sure maintenance of the old couple during the remainder of their lives, after parting with all their property, was manifestly a delusion ; and I say this without questioning that the bond was given in good faith, and with the intention of faithfully fulfilling its conditions.”

Lord Chancellor Hatherley in *Phillips v. Mullings*, L. R. 7 Ch. 244, after referring to *Coutts v. Acworth*, L. R. 8 Eq. 558, *Wollaston v. Tribe*, L. R. 9 Eq. 44, and *Everitt v. Everitt*, L. R. 10 Eq. 405, as holding that where there is no power of revocation in a voluntary deed it will be set aside, lays it down, at p. 247, that “whether there should be a power of revocation or not must depend upon the circumstances ; and that it cannot be laid down as a general rule that such a deed would be voidable unless it contained a power of revocation.”

In that case also the Lord Chancellor said that while cases in relation to voluntary settlements must depend upon the facts, there are certain principles laid down for

the guidance of those dealing with their property in that manner, and of those who have to give such persons advice; and he states, at p. 246: "These principles rest on a broad basis established by a series of decisions. It is clear, for instance, that any one taking any advantage under a voluntary deed, and setting it up against the donor, must shew that he thoroughly understood what he was doing, or, at all events, was protected by independent advice. Again, it is clear that a solicitor who advises a client for his own protection to take a particular step of this nature does assume a very responsible duty, and where a person is induced to execute such a deed, it must, in order to support the deed, be shown that the nature of the deed was thoroughly understood by the person executing it."

Judgment.
MacMahon,
J.

The case in hand is one in which the circumstances shew that the only fair and proper protection which could be afforded to the grantor was by a power of revocation being contained in the deed. Had the plaintiffs the legal advice, which it was their intention to obtain by going to Stirling and consulting a solicitor, they would doubtless have been prevented from consummating the improvident act of executing a deed conveying their whole property without the safeguards which a vigilant and conscientious solicitor would have seen were provided.

Mrs. Hagarty had heard of remarks having been made by the defendant, which induced the plaintiffs to regard his intentions in relation to the preparation and execution of the deed with some suspicion, and they therefore desired to have Mr. Cook, who was a magistrate and reeve of the township, and in whom they had confidence, to be present when the documents were being prepared so as to protect their interests. It may have been that Mr. Cook's presence would have been unavailing to afford the protection which only a skilled lawyer, acting for the plaintiffs, would have secured to them; and even then, as stated by Lord Hatherley in *Phillips v. Mullings*, L. R. 7 Ch. 244, the solicitor in advising "assumes a very responsible duty." As to this particular point, *Toker v. Toker*, 31 Beav. 629. See also

Judgment. *Demorest v. Miller*, 42 U. C. R. 56, pp. 64-65; *Waters v. MacMahon*, *Donnelly*, 9 O. R. 391.
J.

It was urged by counsel for the defendant that the doctrines as to improvidence and the want of professional advice do not apply here as there was no fiduciary relationship existing between the parties.

The law as laid down in *Slator v. Nolan*, Ir. R. 11 Eq., at p. 386, is very broad and unmistakable on the subject. The M. R., Sir Edward Sullivan, there says: "It is an idle thing to suppose that the relation of trustee and *cestui que trust*, or guardian and ward, or attorney and client, or some other confidential relation, must exist to entitle a man to get aid in this Court in setting aside an unconscionable transaction."

I agree with the learned trial Judge that he would have been justified in declaring the deed and life lease void for improvidence and want of professional advice; and, I think, that is the judgment which the learned judge should have directed to be entered, and not a judgment granting the alternative relief.

Where a plaintiff is entitled to a judgment declaring a transaction void, the parties are at once restored to the position in which they were prior to the impeached transaction being entered into, subject in certain cases to a direction to take the accounts between the parties as to maintenance on the one hand and the value of the products of the farm on the other.

I consider the defendant was to blame in inducing the plaintiffs to go to Mr. Wiggins when he knew their desire and intention was to go to Stirling and consult a solicitor; and I am forced to the conclusion that he had a design in getting them to go to Wiggins's where there would be no opportunity of their learning the effect of the deed and life lease there prepared. For, according to the defendant's own statement, he understood he was to have the farm whether he performed the agreement or not as to maintenance and support. For this reason I think the plaintiffs are entitled to their costs.

The judgment of my learned brother Falconbridge will be varied by directing judgment to be entered for the plaintiffs, declaring the deed from the plaintiffs and also the life lease void with costs including the costs of this motion.

Judgment.
MacMahon,
J.

I assume that the defendant will not be at a disadvantage by setting off the maintenance already furnished the plaintiffs against his occupation of the farm. If, however, the defendant desires a reference as to the value of the maintenance supplied as against the occupation, he can have it, if he so elects within three weeks, at the risk of costs in the event of the reference proving adverse to him.

GALT, C.J., concurred.

[COMMON PLEAS DIVISION.]

HANRAHAN V. HANRAHAN.

Infant—Domicile in Quebec—Tutors in Quebec entitled to have infant's money in Ontario paid over to them.

Held, that the duly appointed tutors in the Province of Quebec of an infant domiciled and residing there, which Province had also been the domicile of the father at his death, were entitled to have paid over to them from the Ontario administrators of the father's estate, there being no creditors, money coming to the infant from said estate, which had been collected in Ontario.

Statement. The statement of claim set forth that Thomas Edward Hanrahan, a British subject domiciled and resident at the city of Montreal, in the province of Quebec, departed this life on the 16th day of March, 1887, at Passadena, California, in the United States of America, where he was temporarily residing, leaving him surviving his widow the plaintiff, and his only child, the infant defendant: that at the time of his death the said Thomas Edward Hanrahan was possessed of the sum of \$7,000, which sum was deposited by him to his credit in an incorporated bank in the Province of Ontario, and the said Thomas Edward Hanrahan had no other property within the said Province: that according to the law of the Province of Quebec, such property is equally divisible between the plaintiff and the infant defendant: that the defendants, The Toronto General Trusts Company had been appointed administrators of the said Thomas Edward Hanrahan, and as such had received the said sum of money, and had accounted to the plaintiff for her share thereof, and still had in their hands the share of the infant defendant: that the plaintiff had been duly appointed tutrix of the infant defendant by the proper court of the Province of Quebec by letters of tutorship, dated 5th of August, 1887: that by the law of the Province of Quebec the plaintiff was entitled to demand and receive as such tutrix all the property of the said infant wheresoever situate: that the said law of the Province of Quebec further required that the plaintiff as

such tutrix, should collect all the assets of the said infant : *Statement.* that the plaintiff and the said infant were both British subjects domiciled at and resident in the city of Montreal in said Province of Quebec : that the defendants, the Toronto General Trusts Company, refused to pay the said moneys to the plaintiff as such tutrix.

The plaintiff claimed a declaration that she was entitled to receive said moneys, and an order for the payment thereof.

The official guardian by his statement of defence submitted the rights of the infant defendant to the protection of the Court.

The Toronto General Trusts Company by their statement of defence admitted that they had the money in their hands ; and submitted to such order as the Court might see fit to make.

An affidavit was filed of Selkirk Cross of the city of Montreal, in the Province of Quebec, in which he set forth :

"1. I am a duly qualified advocate of the Province of Quebec, and have been for years actively engaged in practice in the Courts of the said Province, and I am familiar with the law of the said Province.

2. According to the law of the Province of Quebec the tutrix of an infant represents the minor in all civil cases, and is authorized and bound to collect and get in all sums belonging to the minor, suing for them if necessary, and is bound to invest all capital moneys received, and the receipt of the tutrix is a sufficient release to any debtor paying, as a tutrix under the said law is in effect regarded as the minor for all legal purposes.

3. Under and by virtue of the said law a tutrix is not liable to give security for the property of the minor, but the immovable property of the tutrix is subject to a legal hypothec (or mortgage) in favour of the minor, for any moneys of the latter in her hands; and a tutrix is subject to imprisonment if she fails to pay over whatever may be due to the minor.

4. Under and by virtue of the said laws the father of any minor is bound to accept the position of tutor for his child ; and, in case the father is dead, the mother is entitled to be appointed tutrix in preference to any stranger.

5. According to the law of the Province of Quebec the rights of the tutrix extend to all the personal property of the minor wheresoever situate, and her appointment is regarded as of universal effect.

In accordance with this theory the Courts of Quebec recognize the appointment by the courts of the country where the infant or ward is domiciled.

6. I have seen the letters of tutorship appointing Mrs. Victoria Hanrahan tutrix of her infant child Thomas Garnet Hanrahan; and I say

Statement. that the said letters of tutorship, a copy of which are now shewn to me and marked as exhibit "A," appear to have been correctly and regularly issued.

7. Upon the facts stated in the pleadings herein, there can be no doubt that according to the law of Quebec the plaintiff is entitled to the moneys in question."

An affidavit of the plaintiff was also filed verifying the statements made in the statement of claim as to her appointment as tutrix, the deposit of the money and the appointment of the Toronto General Trusts Company as administrators.

Subsequently to the commencement of the action, the tutrix married Robert Murdock Liddell, and he was appointed joint tutor with the plaintiff.

In Michaelmas sittings, November 27, 1889, the case was argued before the Divisional Court (composed of GALT, C.J., and ROSE, J.), upon the above pleadings and evidence.

Maclaren, Q. C., for the plaintiff and the Trust Company.

J. Hoskin, Q. C., for the infant.

The cases referred to sufficiently appear in the judgment.

May 26, 1890. ROSE, J. :—

The facts sufficiently appear in the pleadings as amended. By consent, no question is to be raised as to the marriage of the testatrix after appointment and action brought, and the appointment of herself and husband as joint tutor.

No rights of creditors or others than the infant have to be considered. The estate, so far as any person or persons in Ontario are concerned, has been duly administered.

The sole question is as to the right of the tutor to demand and receive from the Trust Company the moneys belonging to the infant, and to give a sufficient discharge therefor.

Mr. Hoskin was notified by the parties simply to argue the law and to assist the Court to a proper conclusion.

Unless, upon principles which have been established, the Court should refuse to make the order or give judgment

for the plaintiff, there is no opposition to the plaintiff's claim. Judgment.
Rose, J.

The money is not in Court, and there has been no application to have it paid into Court unless, on these proceedings, such would be the proper order. If necessary to give the Court jurisdiction, the company is willing to pay the money into Court.

There is no doubt as to the general principles of law governing personal property. Personal property is subject to that law which governs the person of the owner. "With respect to the disposition of it—with respect to the transmission of it, either by succession or the act of the party—it follows the law of the person:" *Sill v. Worswick*, 1 H. Bl. at p. 690, referring to *Pipon v. Pipon*, Ambl. 25, where Lord Hardwicke, refused to permit an administratrix to take personal property from England to Jersey, notwithstanding that it was urged that according to the law of Jersey the plaintiff would be excluded from sharing in its distribution, although it would be otherwise by the law of England. Lord Hardwicke said, that having acquired the right to it, she was to distribute it according to the law which guided the succession to the personal estate of the intestate.

In *Newton v. Manning*, 1 M. N. & G. 362, the Lord Chancellor (Cottenham) decided that where the petitioner's husband in France had been declared a lunatic under the laws of France, and where "the law of France warranted the petitioner in dealing in the manner proposed with the corpus of her husband's property, she had only to arm herself with the authority of that foreign jurisdiction, and the money would be paid out to her *as any other sum of money in Court would be paid out to a party shewing a title.*" There the application was for the payment of certain moneys out of the corpus of the estate then in Court.

In that case there was, however, a statutory authority: 1 Will. IV. ch. 65, sec. 34.

The authority of the curator in that case was derived from the 450th article of the Code Civil of France, to which

Judgment. Art. 290 of the Code Civil of Quebec, with respect to tutors
Rose, J. of infants is similar. See also Art. 343.

In *Huggins v. Law*, 14 A. R. 383, it was decided that a guardian of infants appointed under our statute could rightfully demand and receive from an executor moneys bequeathed to the infants and give a valid discharge.

Mr. Justice Patterson said that the old action at law for money had and received would have been successful under the old practice.

The affidavit of Mr. Cross of Quebec, an advocate practicing in Montreal, fully sets out the powers, duties and responsibilities of a tutor under the laws of that Province.

I confess I see no answer to the plaintiff's demand. The money belongs to the infant. If he were of age he could demand and recover it by action. During his minority he is by the law of the country he dwells in represented in all civil acts by his tutor. His tutor has the right, and it is his duty to get in his estate. The tutor demands the money from one who holds it. The answer is, that the Court is the guardian of the infant; should look after its interests, and should not direct the administrator here who has given security to pay it over to a tutor in another Province who may have or has given no security.

It seems to me that this Court has not placed upon it the care of infants in another country to such an extent that we are to guard their property so as to give any greater security than that afforded by the laws of their own domicile.

Now, what is there against this view?

Mr. Hoskin stated that he admitted: 1. That the law of domicile governed the disposition of personal property; 2. That apart from the question of infancy, the infant was entitled to the money; and 3. That if there had been debts to be paid in Quebec, or if the case had been one of bankruptcy, the money should be forwarded to the foreign jurisdiction, to be applied in payment of debts.

The admission was also made that in cases of lunacy the money would be paid over to the curator.

The argument against the application was rested on the duty of the Court to retain the money in its own keeping or the keeping of trustees who had given security, and not to send it to the tutor who had not given security, and who might waste the money before the infant attained its majority.

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Rose, J.

The following cases were cited to shew the course followed in our own Courts: *Mitchell v. Richey*, 13 Gr. 445, at p. 453; *Kingsmill v. Miller*, 15 Gr. 171, and *Re Parr*, 11 P. R. 301; and I may add, *Flanders v. D'Evelyn*, 4 O. R. 704.

In *Scott v. Bentley*, 1 K. & J. 281, Sir W. Page Wood, V. C., held that a curator bonis duly appointed in Scotland to a person found lunatic there, could recover and give a good discharge for personal property of the lunatic in England.

He further said, at p. 283-4, that assignees of a bankrupt in England could sue in Scotland, as established by *Selkraig v. Davies*, 2 Rose 97, and that "the only case which seems contrary to this rule is, that of executors who cannot exercise such right in another country." He added: "And it was said in argument that guardians cannot;" but he said "as to guardians, however, I think that has not been so decided;" and then discussed certain cases.

I find this language in the judgment: "As a party abroad can assign his rights, I do not see why a Court of competent jurisdiction should not transfer them when he becomes lunatic." And again, "I do not see why the order of a Court of competent jurisdiction should not have the same effect as the Bankrupt Acts for this purpose," *i. e.* vesting the right of property.

In Dicey on Domicile, 172-6, 195-7, this decision is discussed, and is reconciled with the general principle that a foreign curator as such has not authority in England, on the ground that "the right is one in fact acquired by a transaction taking place wholly under the law of a foreign country, and so enforceable here."

Judgment.

Rose, J.

At p. 12 of Mr. Dicey's work, Rule 30, is followed by an interrogation point thus: "A foreign guardian cannot interfere with moveables situated in England belonging to his ward;" and the explanation in the preface for such note is that "the law is so unsettled that no rule can be stated which ought to be considered as more than a conjectural inference from established principles."

This history of the conflict may be found in Dicey, pp. 172-6; Wharton on Conflict of Laws, 2nd ed., sec. 265, *et seq.*, and Piggott on Foreign Judgments, 2nd ed., pp. 302-6, where the distinction between the powers of the foreign guardian over person and property is noted.

In Simpson on Infants, 2nd ed., at p. 254, it is thus stated: "Personal property in England belonging to an infant domiciled abroad will be paid to him, when he is by the law of his domicile entitled to receive it, or to his guardian, if the latter be so entitled," citing *Re Brown's Trusts*, 12 L.T.N.S. 488; *Re Crichton's Trust*, 24 L.T. 267; *Re Ferguson's Trusts*, 22 W. R. 762.

See also Eversley's Domestic Relations, (1855), where similar language is found, at p. 663; and the cases of *Re Crichton's Trust* and *Re Ferguson's Trusts* cited.

That learned author also says: "As regards personal or moveable property, the right of a foreign guardian to deal with such, has not been the subject of an actual decision, and therefore is still within the region of speculation," referring to the remarks of Wood, V. C., in *Scott v. Bentley*.

Re Hellmann's Will, L. R. 2 Eq. 363, is referred to as the authority for stating that the property will be paid over to an infant residing abroad when he is by the law of his domicile entitled to receive it.

In that case, Lord Romilly, M. R., ordered a legacy to be paid over to a person eighteen years of age, it having been shewn that according to the law of Hamburg, a girl became of age at eighteen; and we will see by the cases to which I will refer now, the Courts have frequently ordered moneys to be paid to infants where by the law of their domicile they were entitled to receive it and give a valid discharge.

So that if here it had been shewn that by the law of Quebec the infant or the infant and his tutor could receive and give a valid receipt or discharge, ample authority has been cited to shew that payment over would be justified. The cases cited also justify the statement of the above learned authors that payment will be made to the guardian if by the law of the infant's domicile he is entitled to receive it.

In *Re Crichton's Trust*, 24 L. T. 267, (1855) Kindersley, V.C., ordered the fund in England to be transferred to the joint names of the infant, above the age of puberty, and her curator upon proof of the law of Scotland that such an infant and her curator might receive payments, and give valid discharges.

In *Re Brown's Trusts*, 12 L. T. N. S. 488 (1865), upon the petitioner adducing evidence to shew that by the law of Prussia he was entitled (in his capacity of guardian of the infant) to receive the fund and administer it during the infant's minority, Wood, V. C., ordered a sum of £2,000, which had been paid into Court to be transferred to the petitioner.

In *Re Ferguson's Trusts*, 22 W.R. 762, (1874), Sullivan, M. R. (Ir.), ordered a fund in Court to be paid to the minor and her curator, it having been shewn that by the law of Scotland they were entitled to give a valid discharge.

Since *Huggins v. Law*, 14 A. R. 383, it is clear that if the guardian were within this Province payment to him would be a discharge to the company.

In *Mitchell v. Richey*, 13 Gr. 445, it was held that the Court would not order money to be paid to the guardian of an infant.

In *Huggins v. Law*, at p. 396, it is said that the reasons relied on in *Mitchell v. Richey*, "are entirely consistent with the validity of the acquittance from the guardian to the person who pays him the infant's money."

Stileman v. Campbell, 13 Gr. 454, follows *Mitchell v. Richey*, and is by the same learned Judge, Mowat, V. C. There the infants were out of the jurisdiction, and a per-

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Rose, J.

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Rose, J.

son within the jurisdiction had a contingent interest in the trust fund, and the money was ordered to be secured in Court.

The learned Vice-Chancellor said: "The case is stronger on this point than *Mitchell v. Richey*, which I have just decided, for not only are the infants the principal parties concerned, but the plaintiff is not resident within the jurisdiction of this Court—he is said to be living somewhere in Arabia; and Duncan Campbell has a contingent interest in the fund."

Kingsmill v. Miller, 15 Gr. 171, was not a case of a guardian but of a trustee. We are not informed as to the nature of the trust, and the decision was that the Court would not on the facts of that case leave the moneys in the hands of the trustee, but would invest it for the infants. *Mitchell v. Richey*, is again referred to, and the decision is by the same Judge.

In *Flanders v. D'Evelyn*, 4 O. R. 704, the plaintiff was the foreign guardian of infants residing in Minnesota, and the action was against the executor under a will containing bequests in favour of the infants.

The learned Judge ordered the money to be paid into Court and not to the foreign guardian, saying, at p. 707, that, "The duties and powers of guardians under the statutes of Minnesota do not seem to be greater than those under the statute 12 Car. II. ch. 24, sec. 9; or of guardians appointed by a Surrogate Court, who are to have the care and management of the ward's estate real and personal.

The decision might have been the different had *Huggins v. Law* been then decided.

The learned Judge, however, took for granted the power to direct payment to the foreign guardian, for he said that the rule laid down in *Mitchell v. Richey*, "may be subject to modification, if the sum is small, and the whole or nearly the whole may be required for the infant's education and maintenance or other immediate use."

That case is referred to by Mr. Justice Burton, in *Huggins v. Law*, at p. 389, as follows:

“ Another case cited below was *Flanders v. D'Evelyn*, ^{Judgment.}
4 O. R. 704; that case might have been disposed of on the ^{Rose, J.}
short ground that a foreign guardian has no *locus standi*
in our Courts.”

With very great respect, I think that statement must, in view of the authorities to which I have referred, be taken with some modification.

In none of the cases cited, has any question been made as to the right of the foreign guardian to appear before the Court and make the application for transferring funds from the Court to himself, to be removed from the jurisdiction. The refusal of the application seems in every case to have been rested upon other grounds.

In Re Parr, 11 P. R. 301, a decision of the learned Chancellor, was not cited to the Court in *Huggins v. Law*. I venture to think it is not in the plaintiff's way.

The motion was *ex parte*, no decisions are referred to by counsel, so far as the report shews; and therefore we are not assisted by the view of the learned Chancellor save upon the narrow case presented. It was not shewn what the duties and powers of the guardian were, in Dakota, U.S., where he and the infants resided, nor was *Huggins v. Law* then decided, so that the refusal to pay out of Court to a guardian either domestic or foreign is no authority that neither one nor the other was empowered to receive infant's money and give valid discharges therefor.

Indeed, I would not conclude from the language of the learned Chancellor and his reference to *Re Andrews*, same vol. p. 199, that he intended to lay down any doctrine contrary to the opinion I have formed.

In *Holderness v. Stock*, an appeal from the County Court of York set down to be heard before the Court of Appeal on the 7th of September, 1880, the Court held, dismissing the appeal, that the defendant was bound to pay a note given by him to a brother of his creditor after the decease of the creditor domiciled in Pennsylvania, U. S., in settlement of a debt owing to the creditor at the time of his death. And this though, so far as appeared, no letters of

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Rose, J.

administration had been taken out in this country. The brother applied to the defendant for a settlement, and the defendant, not questioning his authority, gave the note in settlement.

The case is not reported, but the appeal book may be found in the bound appeal cases for September, 1880.

In this case the sole question we have to determine is, whether "the plaintiff is entitled to receive the moneys, for the defendant company is quite ready and willing to pay over the moneys if in the opinion of the Court it may safely do so and receive a valid discharge from the plaintiff."

It is clear that the tutor if he had been appointed guardian under our statute, would have been entitled to demand and receive this money.

2. That if the money in *Huggins v. Law* had been in the hands of any one in Quebec, the tutor's duty would have been to get it in, and of course his power would be co-extensive with his duty.

3. That if by the law of Quebec, the child had been empowered to demand, recover and give a valid receipt for the money, the Court, following decided cases, would have been justified in directing payment of moneys out of Court to the infant.

4. And to the infant and tutor jointly, if the law of Quebec had empowered them jointly to receive and discharge.

It seems to be a necessary consequence that where the law of Quebec empowers the tutor to receive and give valid receipts, the Court would be justified in transferring to the tutor a fund in Court belonging to the infant.

And, further, it seems to me equally to follow that any one in this Province having moneys belonging to the infant, may safely pay over such moneys to the tutor, and receive a valid discharge therefor.

The order will, therefore, go for payment of the moneys in question to the joint tutor, Victoria Hanrahan, now Liddell, and Robert Murdock Liddell, upon their executing

and delivering at the time of payment, a receipt in form sufficient according to the law of Quebec to discharge the defendant company. Judgment.
Rose, J.

As the parties are acting in harmony, it will not be necessary to provide for settling the form of the receipt.

Nothing was said as to costs, and no order will be made as to them.

GALT, C.J., concurred.

[COMMON PLEAS DIVISION.]

BLAND V. RIVERS.

Prohibition—Division Courts—New trial granted after fourteen days from trial.

An action was tried in a Division Court with a jury on the 15th January, when they found for the plaintiff with a recommendation that plaintiff should pay his own and defendant's costs, whereupon judgment was entered for the plaintiff with costs reserved. On January 24th the Judge directed "judgment for plaintiff with costs on verdict of jury." On February 5th an application was made for a new trial which was granted on February 16th.

Held, that the application for the new trial was too late not having been made within fourteen days from the trial as required by sec. 145 of the Division Court Act, R. S. O. ch. 51; and a prohibition was therefore directed.

THIS was an application for a prohibition to the Sixth Statement Division Court of Northumberland and Durham, to prohibit the proceeding with a new trial granted in this case, on the ground that the application was not made until after fourteen days had expired after the trial.

On April 11th, 1890, *J. B. Clark*, Q. C., supported the motion.

Watson, Q. C., contra.

April 14th, 1890. GALT, C. J.:—

There is no question as to the fourteen days having expired after the trial, that is to say, after the case had been tried at the sittings of the Division Court where the

Judgment.

Galt, C.J.

case had been tried by a jury. When the jury brought in their verdict, they found in favour of the plaintiff as respects his claim, but they also recommended that the plaintiff should pay all the costs.

A note was entered in the Judge's book, which is set forth in the affidavit of Henry Lawless, the clerk of the Sixth Division Court :

"I have * * carefully examined the entries made by His Honor Jay Ketchum, Junior Judge of the said united counties, in the Judge's book used at the trial of the said action, in my Court on 15th January, 1890, and the entry therein relating to said action is the following :

"No. 42, 1889.—John Bland v. John Rivers.—Judge's order.

"Jury find for plaintiff, with recommendation that plaintiff pay his own and defendant's costs. Judgment for plaintiff for \$21.78, question of costs reserved."

And the subsequent entries in this cause are as follows :

"January 24—Judge orders judgment for plaintiff with costs on verdict of jury.

"February 5th—Application for new trial now transmitted to Judge.

"February 14—A new trial granted, costs to abide event."

It is against this last order this application is made—the time within which an application for a new trial must be made, is by sec. 145, "within fourteen days after the trial." In the present case the application was not made within fourteen days after the trial, but was made within fourteen days after the Judge had given his decision on the recommendation of the jury on the question of costs.

It is manifest the decision of the learned Judge had nothing to do with the facts of the case, I mean as to the right of the plaintiff to recover; this was the subject of the trial, and if the defendant disputed that right, and thought that on the facts of the case, the verdict was erroneous, he should, in my opinion, have applied for a new trial within fourteen days. The question of costs was one for the consideration of the Judge, but it was not one on which the rights of the parties in the suit depended.

The motion is absolute, but without costs, as it appears that when the application was argued before the learned Judge, no objection was taken.

[COMMON PLEAS DIVISION.]

BANN V. BROCKVILLE.

Taverns and shops—By-law fixing license fee in excess of \$200—Delay in moving to quash.

A by-law requiring amounts to be paid for tavern license fees in excess of \$200, directed, as required, the votes of the electors to be taken thereon. The by-law was passed on the 25th February, 1889, and on 8th April, 1890, a motion was made to quash it on the ground that the votes of all the duly qualified electors had not been taken thereon, but only those of freeholders. By reason of the by-law the number of licenses was decreased, and had the motion been allowed it would have been too late for the corporation to make any change, by increasing the number of licenses so as to make up the deficiency, or to submit a new by-law. The only evidence in support of the motion was very weak and no person whose vote had been rejected complained. The applicant himself was a tavern keeper who had obtained a license for the year 1889, under the by-law without any objection, and had applied again for the current year :—

The by-law being valid on its face the Court, under the circumstances, considering the lapse of time before motion made, in the exercise of its discretion refuse to interfere.

THIS was an application on behalf of John C. Bann, Statement—
an hotel keeper in the town of Brockville, to quash a
by-law passed on 25th February, 1889, on grounds which
appear in the judgment.

On April 15th, 1890, the motion was argued.

Aylesworth, Q. C., and *Hutchinson*, supported the motion.
Shepley, Q. C., and *Reynolds*, contra.

April 25, 1890. GALT, C. J. :—

The by-law enacts “that from and after the passing of this by-law, the following duties over and above all government duties shall be paid for tavern and shop licenses by the person to whom the same may hereafter be granted—namely, tavern licenses granted to persons exempted from the necessity of having all the tavern accommodation provided by by-law, \$700,” and other tavern licenses \$400. These sums being in excess of \$200, it was necessary under sec. 42 of ch. 194, R. S. O., to submit the same to

Judgment. the electors, the by-law therefore enacted "that the votes
Galt, C.J. of the electors of the said municipality shall be taken on
the said by-law," &c.

This application which was not made until the 8th April last, is based on the ground "that the several deputy returning officers appointed to take the votes of rate-payers upon the said by-law, received only the votes of freeholders thereon instead of the votes of all duly qualified municipal electors."

After the judgment of the Court of Appeal in *Re Croft and the Town of Peterborough*, 17 O. R. 522, there can be no question as to the validity of this objection; and Mr. Shepley, who appeared for the corporation, did not seriously contest it; but he contended that the Court having a discretion in the case, should not give effect to the motion after the delay which had taken place, as the financial affairs of the corporation would be very seriously affected, because if the by-law was quashed, the only duty which the corporation could raise for the present year would be the sum of \$80 as the time at which such a by-law can be passed, is now expired, namely, 1st March.

Bann is an hotel keeper, and applied for and obtained a license under the by-law after the repeal of the prohibitory clause in the Canada Temperance Act, which took effect last year, and it appears from the affidavit of the mayor that when the by-law now in question was under consideration, it was resolved to reduce the number of tavern licenses, which has been done, and which cannot now be altered for the present year. No complaint was made for any thing done last year, nor was the present application made until it was too late for the corporation to make any change or to submit the present or any other by-law of a similar description to the electors.

Bann acted under the by-law last year by obtaining a license, and is again an applicant, and makes no complaint until the time has arrived when he will be liable to pay only \$80 for the present year if this by-law is quashed, and when it is out of the power of the corporation to increase the number of licenses under sec. 20, of ch. 194.

By sec. 332, of ch. 184, of "The Municipal Act," the High Court "may quash the by-law in whole or in part for illegality;" and by sec. 333 such an application in cases like the present may be made at any time. In the case of *Sheley v. The Corporation of Windsor*, 23 U. C. R. 569, which was very similar to the present, the Court held that the long delay between the time of passing the by-law, which took effect on 1st March, 1863, and the time of the application which was in August, 1864, afforded a sufficient reason for not exercising the summary jurisdiction of the Court.

Judgment.
Galt, C.J.

In the present case, the by-law was passed on 25th February, 1889, and this application was not made until 8th April, 1890, so that in fact no change could be made in the license fee or license until next year.

This case differs in one essential respect from *Re Croft and the Town of Peterborough*. In that, as appears from the head note, 17 O. R. 522, certain leaseholders had tendered their votes and had been refused. In the present case all that was done is, as two of the reeves who acted as deputy returning officers state they had votes as leaseholders, but did not vote in consequence of not having freeholds; and one of them states that a man, "whose name I have forgotten," tendered a vote and was by him rejected. This is the whole, and no complaint is made by any person whose vote was rejected. The application is made by a man who has actually availed himself of the provision of the by-law.

The by-law on its face is unobjectionable; the reference to the "electors," is in accordance with the provisions of the Act; had it been defective in that respect as limiting the word "elector" to "freeholder," it would have been unquestionably irregular, and must have been quashed.

Had this motion been made by persons who, by the mistake of the clerk of the municipality in furnishing lists of voters to the deputy-returning officers, had been deprived of their votes, something might be urged against the validity of the by-law. No such allegation is made. It

Judgment. is true that Bann states in his affidavit that he did not
Galt. C.J. tender his vote because he understood it would not be
received. Had Bann intended to question the validity of
the by-law on such a ground, he should have done so in
due time, and not have delayed his motion until the time
had passed within which the corporation might have again
submitted a similar by-law to the "electors," or might have
increased the number of licenses.

As my judgment turns entirely upon the "discretionary" power conferred on the Court, there are three cases to which I refer, namely, *Hill v. Municipality of Tecumseth*, 6 C. P. 297; *Re Michie and Corporation of Toronto*, 11 C. P. 379, and *Re Richardson and Board of Commissioners of Toronto*, 38 U. C. R. 621, in which towards the conclusion of his judgment, Harrison, C.J., says, at p. 630: "This leads me to the conclusion, although not entirely free from doubt, that the objection taken to the by-law in question is not well taken. I may add that even if I had, on an examination of the statutes and authorities, arrived at a different conclusion, I would not have exercised the discretion which the Court has to refuse to quash by-laws after long and unexplained delay; and where the effect of quashing a by-law after such delay, may be to cause great inconvenience and confusion in the affairs of a municipality."

There is here a reference to the case before him as to the duration of the by-law which does not apply to the present.

The motion must be dismissed with costs.

[CHANCERY DIVISION.]

ELLIOTT V. BUSSELL.

Husband and wife—Advance of money from wife to husband—Presumption of gift—Onus—Corroborative evidence—R. S. O. 1887, ch. 61, sec. 10.

Where, in administration proceedings, the widow of the deceased claimed from the executor repayment of certain moneys paid by her, at her husband's request, out of her separate property, on premiums payable on policies on his life, which she swore were to be repaid to her; and it appeared that the moneys were paid by a third person who held them to the use of the claimant; that she acquiesced in the payment of them with great reluctance; and that she had no claim to any part of the policy moneys, which were wholly at the disposition of the deceased:—
Held, that under these circumstances the *onus* was on the executor to prove that the moneys were a gift to the deceased, and it was not necessary for the claimant to produce corroborative evidence that the moneys were to be repaid in order to recover.
 In order to make out that money paid by a wife to her husband was a gift, it is necessary to prove it either by direct evidence or by such a course of dealing between the husband and wife as shews that the money was so paid to him as a gift.

THIS was an appeal by the defendant from the report of *Statement.* the local Master at Milton in administration proceedings, and the circumstances of the case are fully set out in the judgment of ROBERTSON, J.

The appeal came up for argument in March 13th, 1890, before ROBERTSON, J.

Laidlaw, Q. C., for the appeal.

Kilmer, contra.

May 14th, 1890. ROBERTSON, J.:—

This is an appeal from the report of the learned local Master at Milton, bearing date February 15th, 1890, allowing to the plaintiff the sum of \$865.67 and interest for money paid by the plaintiff to the use of her late husband, William Elliott, the testator, (whose executor the defendant is) at his, the testator's, request, on premiums payable by the testator, on two life assurance policies on his own life, on the ground that there was no corroborative

Judgment. evidence that the said moneys were to be repaid to the plaintiff. It is admitted that these moneys were paid by the plaintiff at the request of the testator, and that they were the separate moneys of the plaintiff and had never been reduced into the possession of the testator; but it is denied that they were to be repaid to the plaintiff.

Counsel for the plaintiff at the bar, besides contending that it was not for the plaintiff to prove by corroborative testimony the agreement to repay, alleged that these moneys were not the moneys of the plaintiff, but were really trust moneys in her hands for her two children by a former husband, viz., Thomas H. Sheppard and Stanley Sheppard, who are both infants under the age of twenty-one years, and who are not parties to this action, nor have they been so made in the Master's office, and whose interests consequently were not looked after or guarded. This fact, however, was not made clear on the evidence, although it does appear, not only in the plaintiff's evidence, but in an affidavit filed by her, that they were, at least in part, the moneys of these infants. Under these circumstances, I felt it incumbent on me shortly after the case was argued to suggest that it should be referred back for further enquiry; and if necessary to make the infants parties, and I directed Mr. William Davidson to act as guardian *ad litem*, the official guardian having already on hand the interests of the infant children of the testator, whose interests were adverse to the others. All parties having met and Mr. Davidson having made enquiry, it turns out on evidence satisfactory to me that the plaintiff was mistaken when she stated in her evidence that these moneys were those of the first named infants, although it was quite reasonable for her to assume that her first husband so intended as to the moneys, which were the proceeds of life assurance on his life, but which it now turns out were payable on his death to the wife alone. This being admitted on all hands, there is no necessity for a reference back, nor should the first named infants be made parties. The question therefore comes before me as it did

before the learned Master, and the question is whether he Judgment. was right in holding that the plaintiff, on the evidence, is Robertson, J. entitled to recover.

The conclusion that I have come to, although I confess not without some doubt, is that the learned Master is right, and the appeal should be dismissed. It appears to me that there is no doubt on the evidence, in fact the defendant admits that the plaintiff did pay the moneys charged, at the request of the testator, for the purposes alleged. And she positively swears that she was to be repaid the amounts so paid by her. I think the defendant is bound to shew under these circumstances that they were a gift from the wife to her husband. That issue is upon him; and the presumption is not under the circumstances detailed in evidence, that they were a gift. The moneys were the separate moneys of the plaintiff. The testator had no control whatever over them, they were paid by a third person, who held them to the use of the plaintiff, and they were paid by his cheque to the insurance companies. They were not used in any way for the support and maintenance of the plaintiff, they were specifically applied in payment of the premiums payable on policies, which were for the benefit of the testator, or his estate, no part whereof was payable to, or had the plaintiff any claim on them. The testator could dispose of them as he pleased, and he did do so, and on the authority of *In re Flamank, Wood v. Cock*, 40 Ch. D. 461, I am of opinion that she is entitled to recover. That case is not exactly on all fours, so to speak, with the one now in hand, but the same principle is involved in it, and Mr. Justice Kay, in giving judgment, says at p. 469: "Here is property" (it was a mortgage) "which originally belonged to Mrs. Flamank for her separate use, and was transferred to her husband without any evidence whatever of there being an intention on her part to give it to her husband as his property at that time; and the question is whether looking at all the facts, the Court can come to the conclusion that she did deliberately give it to her husband as his property. I cannot conclude that from the

^{1, 2, 3}
Judgment. mere fact of the transfer of the mortgage to the husband.
 Robertson, J. The circumstances which are relied upon are the realization of the mortgage by him in 1869, the concurrence of the wife, the receipts of the purchase money by him, and the fact that no claim was made against him for it. But it is to be observed that the wife had no separate advice, and that her signature to the deed of assignment, in which she only joined as one of the executors of Daniel Codner, the original mortgagee, appears to have been obtained by the husband. I am quite unable to infer from all these facts that she made any gift of this money to her husband." The learned Judge then goes on to say: "Thinking the burden of proof to be on those who claim under the husband to show a gift of the capital, I must say, on a careful investigation of the case, that they have not made out any such gift, and accordingly, I think the claim, this claim against the estate of the testator Thomas Flamank, must succeed."

Applying the facts of the above case to this, it will be found that the circumstances are much more in favour of the plaintiff's contention here than they were in *Re Flamank*. The evidence discloses the fact that the plaintiff would not advance these moneys until her husband promised and agreed that he would repay her the amount, and further that she with great reluctance even then gave way to his request, in fact she states that on each occasion when the amount of the premium was asked from her, there was a "*row about it*." I have no doubt whatever that that was true, and the Master has found the facts in her favour, and according to the case above referred to there was no evidence in support of the defendants' contention that there was a gift of these amounts.

The case of *Caton v. Rideout*, 1 MacN. & G. 599, also supports the contention that in order to make out that the money was a gift, the party so contending must make out that fact, either by direct evidence or by a course of dealing as existing between the husband and wife, which shews that the money was paid to him as a gift.

There is not a single circumstance here which points in that direction. Judgment.

Robertson, J.

I am, therefore, of opinion that the appeal should be dismissed, and with costs, to be paid out of the estate. The costs to Mr. Davidson in the matter to be fixed by me and paid out of the suitors' fee fund.

A. H. F. L.

[CHANCERY DIVISION.]

RE SAUGEEN MUTUAL FIRE INSURANCE COMPANY.

KNECHTEL'S CASE.

Insurance — Mutual Insurance Companies — Statute law — Retrospective operation—53 Vict. ch. 44, sec. 4 (O.)—R. S. O. 1887, ch. 167, sec. 132.

Held, that 53 Vict. ch. 44, sec. 4 (O.), substituting a new section for R. S. O. 1887, ch. 167, sec. 132, is retrospective in its operation, and applies to premium notes given before its passing as well as to those given afterwards.

THIS was an appeal from the judgment or finding of the Local Master at Guelph, on an application of the liquidators of the Saugeen Mutual Fire Insurance Company, to place D. Knechtel, a former policy holder in the company, who held his premium note for \$50, on which there was an unpaid balance of \$18.75, on the list of contributories. The policy expired in 1887; there were no unpaid arrears due on the note. The winding-up order was made on November 5th, 1889, on the petition of creditors. The company was purely a mutual company. On December 11th, 1889, the final winding-up order was made appointing the liquidators; and on February 27th following, the liquidators filed a provisional list of contributories, on which was the name of the respondent, No. 3002, showing the original amount of a premium note alleged to be given by the respondent to be \$50; on account of which he had paid \$31.25, leaving a balance of \$18.75, for which balance

Statement. the liquidators sought to have the respondent's name placed on the list of contributories, &c. Objection was taken that the respondent was entitled under section 4 of ch. 44 of 53 Vic. (O), to have the said note delivered up to him to be cancelled on the ground that more than forty days had elapsed since the expiration of the policy, or the term of insurance had ended, there having been no lawful assessments of which notice had been given to the maker of the note during the currency of the policy, or within the period of forty days thereafter; and that therefore the respondent's name should not be placed on the list, &c., and the above Act was relied on. The Local Master gave effect to the objection, and the liquidators now appealed.

The appeal came up for argument before ROBERTSON, J., on May 8th, 1890.

Kingston, Q. C., for the appellants, the liquidators of the company. Our ground of appeal is, that section 4 of the Act, 53 Vic. ch. 44, (O), does not apply to this case, and that irrespective of the statute, a mutual company could assess on premium notes after forty days from the end of the term. Under the Ontario Insurance Act, R. S. O. (1887) ch. 167, sec. 124, such assessment could be made. But whether they could assess or not under R. S. O. (1887) ch. 167, the liquidators had power to make a levy under the Winding-up Act. Nothing in 53 Vic. ch. 44, (O), says it shall have a retrospective effect. The statute must not be read so as to impair an obligation. It must not be supposed that the legislature exceeded their jurisdiction, and infringed on insolvency legislation. Next I point out that if this statute applies, it indirectly repeals a large part of the Ontario Winding-up Act, which it should not be presumed to do. In this new Act there is a very great change made in mutual insurance law. I refer to *McEvoy v. Clune*, 21 Gr. 515, on the question as to whether the statute is retrospective.

Hoyles, Q. C., contra. As to sec. 124 of R. S. O. ch. 167, ^{Argument.} under which the liquidators claim, it provides that assessments are to be made under directions of the board of directors. There are no directors now. This section cannot apply to an assessment made by the Master. I submit, moreover, that 53 Vic. ch. 44, sec. 4, (O), is retrospective, for it is passed for the purpose of removing doubts and explaining the true construction of the former section. There were doubts as to the meaning of the former section : *Victoria Mutual Fire Ins. Co. v. Thompson*, 32 C. P. 476, 9 A. R. 620. Where a statute is passed to remove doubts, it is to be considered retrospective : *Wilberforce on Statute Law*, p. 165 ; *Rex v. Inhabitants of Dursly*, 3 B. & A. 465 ; *Attorney-General v. The Bristol Water Works Co.*, 10 Ex. 884 ; *McEvoy v. Clune*, 21 Gr. at pp. 519, 521, 523. There were doubts as to the meaning of the old sec. 132, and unless this is retrospective, the intention of the Legislature to remove doubts is not carried out. There is no reason why it should not be retrospective, since there is no interference with vested rights or with property.

May 13th, 1890. ROBERTSON, J.—[After setting out the facts as above.]

The decision of this appeal turns upon the question whether the substituted section 132, enacted by sec. 4 of the amending Act, 53 Vict. ch. 44 (O), is to be read as having a retrospective effect or not. Section 132 of the Ontario Insurance Act, R. S. O., 1887, ch. 167, was in these words :

“Forty days after the expiration of the term of insurance, the premium note or undertaking given for the insurance shall, on application therefor, be given up to the signor thereof, provided all losses and expenses with which the note or undertaking is chargeable, have been paid.”

The substituted section, 53 Vic. ch. 44, sec. 4, (O), is in these words :

“To remove doubts, sec. 132 of the said Act” (The Ontario Insurance Act) “is repealed, and the following

Judgment. section substituted therefor, 132 : On the expiration of
Robertson, J. forty days after the term of insurance ended, the premium
note or undertaking given for the term, shall be absolutely
null and void, except as to first payment or instalments
thereof remaining unpaid, and except as to lawful assessments,
of which written notice pursuant to sections 124
and 126, has been given to the maker of the premium
note, &c., during the currency of the policy, or within the
said period of forty days." * *

There was no evidence offered that there was any overdue assessments payable on the note.

In *McEvoy v. Clune*, 21 Gr. 515, it was held that 27 Vic. ch. 13, (1863), was declaratory of the meaning of the 257th, 258th, and 259th sections of the C. L. P. Act, and was retrospective in its effect. The words in the declaratory Act were : " Whereas doubts have arisen as to the meaning of the 257th, 258th and 259th sections of the C. L. P. Act, being 22nd ch. of the Con. Stat. for U. C. Therefore Her Majesty, &c., enacts as follows : 1. Whenever the word 'mortgagor' occurs in the said sections, it shall be read and construed as if the words 'his heirs, executors, administrators, or assigns, or person having the equity of redemption,' were inserted immediately after such word 'mortgagor,'" &c.

Reading carefully the repealed section 132, and comparing it with the substituted section, it is clear that the Legislature, by the latter, have only declared what it intended by the former. There is no question that doubts have arisen as to the meaning of the old section ; the legislature has so declared ; and that being the case, it has taken upon itself the office of interpreter, and has expressed itself in plain and unmistakable language as to what it meant by its previous enactment. It might be said with some force, I think, that the original section meant exactly what the substituted section says it was intended it should mean, without this legislative interpretation. By the original section the note after forty days after the expiration of the insurance, should be given up, " provided all losses and ex-

penses with which the note, &c., is chargeable, have been paid." The forty days, no doubt, were given to enable the company to make any assessment which might be chargeable against the note; if that was not done within these forty days it was to be presumed that the company had no further claims. That has been made clear now by the substituted section. There is no declaration that the new section is only to affect premium notes given after the passing of the substituted section; or that it is only to be construed as affecting cases which may thereafter arise, but it obliterates entirely the old section, and "substitutes" another for it. In my judgment that section is now to be read as if it was the original section from the passing of the original Act.

I think, therefore, the Local Master was right in the conclusion come to by him, and the appeal should be dismissed with costs, to be paid by the liquidators out of the estate.

The liquidators' costs will be dealt with hereafter, when the estate is wound up and they apply for their discharge.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

CANN V. KNOTT ET UX.

Execution — Free grants and homesteads — Exemption from execution — Interest of original locatee as mortgagee after alienation.

The defendant was locatee of certain lands under the Free Grants and Homesteads Act, R. S. O. ch. 25, and duly obtained patents therefor.

Afterwards he and his wife sold and conveyed parts of the land, he taking back mortgages to secure the purchase money :—

Held, that the mortgages were not interests in the land exempt from levy under execution within the meaning of sec. 20, sub-sec. 2.

The exemption extends to the land or any part thereof or interest therein so long as it is held by the original location title, whether before or after patent ; but where there has been a valid alienation, a mortgage taken by the original locatee does not vest in him *quâ* locatee.

The word "interest" used in the sub-section does not extend to the chattel interest of a mortgagee.

Statement.

THIS was an action brought by George W. Cann to set aside an assignment of two mortgages by the defendant James Knott to the defendant Elizabeth Knott, his wife, as fraudulent and void against the plaintiff, and to have it declared that the mortgages were assets of the defendant James Knott liable to satisfy a certain judgment against him obtained by one Samuel Johnston, and assigned to the plaintiff.

The mortgages in question were made to the defendant James Knott by William Beswick and Henry William Clarke, and covered parts of lot 19 in the 2nd concession of the township of Chaffey, in the district of Muskoka, of which lot and the adjoining lot 20 the defendant James Knott was locatee under the "Free Grants and Homesteads Act," R. S. O. ch. 25, and afterwards obtained patents therefor. The mortgages were made to secure the purchase money of portions sold and conveyed to Beswick and Clarke by both defendants.

Among other defences, the defendants set up that the assignment of the mortgages was made by one to the other in good faith and for valuable consideration, and without knowledge on the part of the defendant Elizabeth Knott of the indebtedness of her co-defendant, and without

any fraudulent intent, or for the purpose of defeating or ^{Statement.} delaying creditors; that the moneys secured by the two mortgages were the amounts of the purchase money payable by the mortgagors in respect of the respective lands mentioned in the mortgages, and the consideration money for the sale and conveyance by the defendants to the mortgagors of such lands.

The action was tried before BOYD, C., at the Toronto Spring Chancery Sittings, on the 19th May, 1890.

The case was argued at the conclusion of the evidence.

Foy, Q. C., for the defendants. The land comprised in the mortgages, and the mortgages themselves, are exempt from seizure under execution by R. S. O. ch. 25, sec. 20. The plaintiff has to shew that the mortgages are not an "interest" protected by the statute and exempt for twenty years after patent. There is no evidence of intention to defeat the claim of Johnston, or of knowledge on the part of the defendant Elizabeth Knott of her husband's indebtedness. I refer to *Robertson v. Holland*, 16 O. R. 532; *Gibbons v. Wilson*, 17 A. R. 1; *Johnson v. Hope*, *ib.* 10; *Burns v. Mackay*, 10 O. R. 167; *Ex parte Mercer*, 17 Q. B. D. 290.

D. Urquhart, for the plaintiff. Is this an interest in land within the Act? See secs. 17 and 19. A mortgage is only a chattel interest, and the whole statute points to the conclusion that a freehold interest is contemplated. The mortgage is taken in the name of the husband alone, shewing that he was the one who had the interest after the alienation.

June 4, 1890. BOYD, C.:—

The plaintiff seeks equitable execution in respect of two mortgages assigned by the debtor to his co-defendant, his wife, on the ground that the transfer is void as against creditors. The main defence is that the mortgages are not seizable or exigible under execution, because they

Judgment.
Boyd, C.

represent an interest in land which is protected by the Act respecting "Free Grants and Homesteads," R. S. O. ch. 25. James Knott, the defendant, was locatee under this statute of lots 19 and 20 in the 2nd concession of Chaffey, and duly obtained patents therefor. On the 2nd June, 1886, Knott and his wife (the now defendants) sold and conveyed twenty-five acres of lot 19 to Beswick, and thirty acres of the same lot to Clarke, taking back mortgages to secure the purchase money made to James Knott, as sole mortgagee. These are the mortgages now in question. The defendants rely on sec. 20, sub-sec. 2, which is thus expressed :

"After the issuing of the patent for any land, and while the land or any part thereof, or interest therein, is owned by the locatee or his widow, heirs, or devisees, such land, part, or interest, shall during the twenty years next after the date of the location be exempt from attachment, levy under execution, or sale for payment of debts, and shall not be or become liable to the satisfaction of any debt or liability contracted or incurred before or during that period, save and except a debt secured by a valid mortgage or pledge of the land made subsequently to the issuing of the patent."

I am of opinion that the mortgages above mentioned are not interests in the land exempt from levy under execution within the meaning of the 20th section. By section 17* the parts sold to Beswick and Clarke were validly alienated. By virtue of that alienation these parts of the land were taken out of the operation of the Act. When the owners of these parts mortgaged them to Knott he received the security, not under the provisions of the statute, but as one who had contracted himself out of his

* No alienation (otherwise than by devise) and no mortgage or pledge of the land, or of any right or interest therein, by the locatee after the issue of the patent, and within twenty years from the date of the location, and during the life-time of the wife of the locatee, shall be valid or of any effect, unless the same be by deed in which the wife of the locatee is one of the grantees with her husband, nor unless such deed is duly executed by her.

privilege. The language used in sub-section 2 is peculiar, and emphasizes this point by speaking of the person entitled to protection as *locatee*, albeit the patent has issued. That is to say, the exemption extends to the land, or any part thereof, or interest therein, so long as it is held by the original location title, and this whether before or after patent. But if the chain of privilege is broken by the valid alienation of any part of the land, then a mortgage taken upon that part by the original locatee does not vest in him *quâ* locatee.

Judgment.

Boyd, C.

Again the word *interest*, as used in this sub-section, does not appear to me intended to include the interest of a mortgagee; because the context indicates such an interest to be protected as passes beneficially "to widow, heirs, or devisees": that is to say, a chattel interest is not contemplated, which would vest in executors upon the death of the locatee or patentee. I quote the language of Lord Selborne in *Heath v. Pugh*, 6 Q. B. D. at p. 359, as pertinent: "In equity the conveyance of the legal estate to a mortgagee was regarded as nothing more than a security for a debt. During the subsistence of the equity of redemption, the debt, together with this benefit of the security, passed to the executor by a will of personal estate, and the legal title to the land did not pass by a general devise of all the mortgagee's real estate in a will duly attested, because it was not regarded in equity as any part of that estate." See also *Carscaden v. Shore*, 17 C. P. 493; *Wilde v. Wilde*, 20 Gr. at p. 534.

Upon the merits, I think the plaintiff should succeed; but it is not a case for costs against the married woman.

[QUEEN'S BENCH DIVISION.]

CUMMING ET AL. V. LANDED BANKING AND LOAN
COMPANY.

Trusts and trustees—Breaches of trust—Taking securities in name of one of two joint trustees—Pledging securities for advance—Misapplication of moneys advanced—Following securities in hands of pledgee.

One of two joint trustees assumed to lend trust moneys on the security of mortgages on land, taking the mortgages to himself alone "as trustee of the estate and effects of J. C., deceased." These mortgages were hypothecated by him to, and moneys were advanced to him by, the defendants, ostensibly to meet an unexpected call by one of the beneficiaries; but the moneys were not so applied, nor otherwise for the benefit of the estate, and they were not required for any such purposes under the terms of the will creating the trust.

In an action by the other trustee and two new trustees, who were also beneficiaries, appointed in his stead:—

Held, that he had been guilty of two breaches of trust, and that the plaintiffs were entitled to follow the trust securities and to make the defendants account for all moneys received by them thereunder.

Statement.

JAMES CUMMING, of the village of Trenton, died on the 1st of February, 1873, having in his life time made his will and devised and bequeathed all his estate to his executors, the plaintiff Robert T. D. Cumming and one Thomas B. Wragg, upon the trusts set forth therein, including a trust to invest the moneys belonging to the estate in good, safe securities, and to receive the interest arising therefrom, and out of the same and the other revenue and income arising from the estate to maintain and educate the children of the testator, and to reinvest upon good safe securities as aforesaid, any surplus of the said interest, revenue, and income which should remain after the payment for the maintenance and education aforesaid.

The plaintiff Robert D. T. Cumming and Thomas B. Wragg proved the will and accepted the burthen of the trusts.

In the year 1881 Thomas B. Wragg, as one of the trustees, lent certain of the moneys of the estate to one Alfred Brignall, and took from him a mortgage upon certain land for \$2,230, with interest at six and one-half per cent. per annum, to secure re-payment of the loan. In the

same year Wragg also lent certain of the moneys of the ^{Statement.} estate to one Owen Foley, and took from him a mortgage upon certain land for \$3,370, with interest at seven per cent. per annum, to secure re-payment of the loan.

These mortgages were both made in favour of Wragg alone, and upon the face of them were expressed to be made to him as trustee of the estate and effects of the late James Cumming, deceased.

On the 14th June, 1883, Wragg assigned and transferred these two mortgages with all moneys then due or to accrue due in respect thereof to the defendants to secure to them the repayment of a loan of \$5,000, which was made on the 19th June, 1883, by the defendants to Wragg, which loan was to be repaid by Wragg to the defendants on the 14th June, 1884, together with interest at eight per cent. per annum.

By an order made in an action of *Cumming v. Wragg*, on the 5th April, 1886, two of the present plaintiffs, Flora M. A. Wright and Daniel R. Murphy, were appointed trustees of the will of James Cumming, in the place of Wragg jointly with the plaintiff Robert D. T. Cumming, the continuing trustee; Cumming and Wright being also beneficiaries under the will.

This action was brought in the name of the three trustees. The statement of claim set out the foregoing facts, and charged that Wragg, without any notice to or knowledge on the part of the plaintiff Robert D. T. Cumming, improperly took the two mortgages unto himself alone; that at the time of the assignment by Wragg to the defendants the latter had notice and knowledge that he was committing a breach of his duty as trustee; and that Wragg had no power or authority as against the plaintiffs and the estate and the beneficiaries thereof, which the plaintiffs represented, to assign the two mortgages to the defendants; and that in attempting to do so, he committed a breach of duty as trustee; and that the defendants were accountable to the plaintiffs for all moneys received under or in connection with the mortgages, and were bound to

Statement. re-assign to the plaintiffs after accounting as aforesaid. The plaintiffs prayed consequential relief, or, in the event of its being held that the assignment made by Wragg was valid as against the plaintiffs, that they might be allowed to redeem the mortgages.

The statement of defence set up that Wragg was mortgagee of the lands mentioned in the statement of claim by way of security for certain moneys alleged in the Brignall and Foley mortgages respectively to have been advanced by Wragg to the mortgagors in the mortgages respectively named; that the description of Wragg contained in the mortgages was in the words following: "Thomas Busby Wragg, of the city of Belleville, in the county of Hastings, and Province of Ontario, Esquire, trustee of the estate and effects of the late James Cumming, deceased, hereinafter called the mortgagee; that the defendants had no knowledge of the affairs of the estate, and dealt with Wragg in good faith as the person entitled by law, as he in fact was, to collect the moneys secured by the mortgages, and to release, assign, or dispose of the mortgage securities; that the plaintiffs, and those through whom or on whose behalf they claimed, had notice or knowledge of the transfer of the mortgages to the defendants, and had by acquiescence therein waived all objection thereto, and were estopped from complaining thereof as against the defendants; and the defendants claimed the benefit of secs. 18, 19, 20, 21, and 29 of the "Act respecting Trustees and Executors and the Administration of Estates," R. S. O. ch. 110.

The defendants further alleged in their defence that Wragg was the acting trustee of the estate of James Cumming, and that the plaintiffs permitted him to have the sole charge and management of the affairs of the estate until after the assignment to the defendants of the mortgages in question, and allowed him to invest the moneys of the estate in such manner as he might deem proper, and if there was at the time of the assignment of the mortgages to the defendants any other trustee of the

estate, the defendants were not aware of it; that the Statement. plaintiffs had recovered a judgment in the High Court of Justice for Ontario against Wragg for all moneys he was liable to account for to the estate.

The defendants submitted to be redeemed by the persons entitled to the equity of redemption in the mortgaged lands upon being paid the principal and interest moneys owing to them upon the mortgage securities, and the costs and expenses incurred in respect thereof, and the costs of this action.

The action was tried before BOYD, C., at Toronto, on the 3rd May, 1890.

The facts, in addition to those set out above, are stated in the judgment.

The case was argued at the conclusion of the evidence.

A. H. Marsh, Q. C., for the plaintiffs. The defendants had notice that Wragg was a trustee. It was their duty to ascertain his position and powers. There is no such thing as an acting trustee; one executor may act, but not one trustee: *Wilbur v. Almy*, 12 How. 180. The defendants were bound to inquire: *Bank of Montreal v. Sweeny*, 12 App. Cas. 617; *Bayard v. Farmers' Bank*, 52 Pa. St. at pp. 237-8; Jones on Pledges, sec. 474. It was their duty to inquire, and inquiry would have led to information which would have saved the estate from loss: *Jones v. Williams*, 24 Beav. at p. 62; *Gaston v. American Exchange National Bank*, 29 N. J. Eq. at pp. 102-3. Inquiry would have led to knowledge of breach of trust in several respects: 1. There were two trustees, and it was a breach of duty to take the mortgages to one only: *Consterdine v. Consterdine*, 31 Beav. 330; *Lewis v. Nobbs*, 8 Ch. D. 591; Lewin on Trusts, 8th ed., p. 337. 2. It was said that the money received by Wragg from the defendants, was to be paid to an heir. That was not the case; and if it had been, it was a breach of trust, because the estate was not divisible till the youngest child came of age. The income

Argument.

only was to be paid by the trustees for maintenance. 3. It was a breach of duty to deal with the securities by way of sub-mortgage. The trustees were to invest and keep invested the moneys of the estate in good, safe securities. Secs. 18, 19, 20, 21, and 29 of R. S. O. ch. 110 do not justify a pledging of securities. See Perry on Trusts, 4th ed., sec. 466.

S. H. Blake, Q.C., for the defendants. There is no authority to shew that any inquiry is to be made where a mortgage is made to one described as a trustee. Stock cases do not apply to mortgages. The defendants are in the position of purchasers for value without notice: *Wright v. Leys*, 8 O. R. 88; *Davis v. Hawke*, 4 Gr. 494. Wragg was an executor, whose duty it was to discharge the debts, and it was not for the defendants to inquire whether the functions of an executor were at an end or not. The defendants had no notice of the will; it did not form a link in the title which they had to investigate upon taking the security, and it was not needful for them to see it at all. But even if the will were looked at, it would justify the executor in raising money for maintenance. There is nothing to shew that the moneys advanced by Wragg were not part of the income of the estate. Facts cannot be assumed against the defendants. There is no evidence that the defendants had notice or knowledge when they took the assignment from Wragg that he was acting beyond the scope of his duties. I refer to *Pilcher v. Rawlins*, L. R. 7 Ch. 259, 263; *Carter v. Carter*, 3 K. & J. 617; *Corser v. Cartwright*, L. R. 7 H. L. 731, 736; Lewin on Trusts, 8th ed., pp. 859, 860. Judgment has been obtained by the plaintiffs against Wragg, and they are not entitled to this remedy in addition. They have elected to take their remedy against Wragg.

MacKelcan, Q. C., on the same side. There is no distinction between the right of the executor to realize by selling the security, which is a legitimate way of proceeding, and borrowing on the security, which is a realization *pro tanto*. Executor was still the function of Wragg

till the legatees were paid and the estate distributed. I *Argument.* refer to Lewin on Trusts, 8th ed., pp. 477, 480; Coote on Mortgages, 5th ed., pp. 308-15; *McLeod v. Drummond*, 14 Ves. 353; 17 Ves. 152; *Miles v. Durnford*, 2 DeG. M. & G. 641; *Vane v. Rigden*, L. R. 5 Ch. 663; *Childs v. Thorley*, 16 Ch. D. 151; *Watkins v. Cheek*, 2 Sim. & Stu. 199; *Farhall v. Farhall*, L. R. 7 Eq. 286; *Cruikshank v. Duffin*, L. R. 13 Eq. 555; *Devitt v. Kearney*, 13 L. R. Ir. 45, (1884). The plaintiff Cumming is not entitled on account of laches to seek equity against the defendants. The judgment against Wragg has satisfied the claim now sued for.

Marsh, in reply. The Trustee Act is limited to real estate devised by the testator, and is not applicable. See Fisher on Mortgages, 4th ed., sec. 428. The defendants have not satisfied the onus of shewing that the mortgages are valid, and that they should get the benefit of them. The plaintiffs are legatees and trustees, and can maintain the action.

June 4, 1890. BOYD, C. :—

The Act relating to Trustees and Executors, which is pleaded by the defendants, does not appear to affect this case. The question is short and simple: has the defendant company with notice of the trust obtained misapplied trust property? The cases cited as to executors seem beside the real question—for here the executorial powers had ceased, and the fund was being dealt with as a trust. That being so, one of the joint trustees assumes to lend two sums of trust money on the security of mortgages on land, to one Foley and one Bignall. Both mortgages are on the face expressed to be taken to Wragg, “trustee of the estate and effects of the late James Cumming, deceased.” This was a breach of trust to start with, for one trustee has no power so to vest the assets in himself to the exclusion of his fellow trustee. But the security being ample to answer the demand, no question arises except in regard to following this trust security. These mortgages were

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Boyd, C. funds ostensibly to meet an unexpected call by one of the
heirs for a large sum of money, and herein appears a
second breach of trust. The money was not so applied,
nor was it required for any such purpose under the terms
of the testator's will. James Cumming, the testator, died
in February, 1873; this transaction was ten years after-
wards in 1883; the division of the estate among the
family was not to take place till the youngest daughter
was of age, and she at the father's death was only seven
years old. There is no proof that the money was applied
otherwise for the benefit of the estate. Upon these facts,
I think that the defendants must account for all moneys
received by them under the Foley and Bignall mortgages,
as part of the estate represented by the present plaintiffs.
The principle of this decision is to be found in *Bank of
Montreal v. Sweeny*, 12 App. Cas. 617, and having regard
to *Carson v. Sloane*, 13 L. R. Ir. 139, I see no disability in
any of the plaintiffs to recover.

Costs will follow the result.

[CHANCERY DIVISION.]

BRUYEA V. ROSE.

Landlord and tenant—Encroachment by tenant on adjoining land—Title by possession—Action of trespass—Intruder on Crown lands.

A lessee of a lot had for more than twenty years exercised acts of ownership over part of a lot adjoining, and now claimed to have acquired title from his landlord by possession to the said part, and brought this action of trespass against the present owner of the rest of the said adjoining lot:—

Held, that his action must be dismissed, for although a tenant taking in land adjacent to his own by encroachment, must, as between himself and his landlord, be deemed *prima facie* to take it as part of the demised land, yet that presumption will not prevail for the landlord's benefit against third persons.

The result of the cases appears to be that where a person is in possession with the assent of the Crown, paying rent; or where a person is a purchaser, although the patent has not issued, such person can maintain trespass against a wrong-doer, but this was not the present plaintiff's possession.

Harper v. Charlesworth, 4 B. & C. 574, referred to and specially considered.

THIS was an action of trespass to land brought under Statement. circumstances which are fully set out in the judgment, where the arguments of counsel are also referred to.

The action came on for trial at Belleville on September 27th and 28th, 1889, before MACMAHON, J.

Dickson, Q. C., for the plaintiffs.

Clute, Q. C., and *Burdette*, for the defendants.

May 22nd, 1890. MACMAHON, J.:—

The action is one of trespass to land. The plaintiffs allege in the statement of claim that they occupy the south half of lot 5, and the defendants the south half of lot 6 in the tenth concession of the township of Murray in the county of Northumberland: That the plaintiff Jane Bruyea is a daughter, and one of the heirs-at-law of the late Wm. Bamber, who died seized in fee of said lot 5 in the tenth concession up to the old line fence claimed to be the boundary line between it and the south half of lot 6,

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MacMahon,
J.

and to which line the plaintiff claims to recover in the action: and also that the plaintiff John Bruyea and those through whom he claims title, and right to the possession, and said Wm. Bamber and his heirs have for over thirty-five years been in continuous possession of the land up to a certain line fence which during said period has been treated and recognized to be the line fence between the plaintiffs, and the defendants' lands.

The plaintiffs claim that said line fence is the true line between said lots 5 and 6, but whether it is the true line or not, that they are entitled to possession up to that line as against the defendants by length of possession.

The plaintiffs allege that in the spring of 1887, the defendants unlawfully moved said line fence some eight or ten rods in on to the land occupied by the plaintiffs, thereby including the same with land occupied by the defendants as part of the south half of lot 6, and depriving the plaintiffs of the use and possession of the said land.

The plaintiffs claim damages for the trespass, and ask to have the line fence restored to the line it occupied, and the possession of the land restored to the plaintiffs.

The patent from the Crown for lot No. 5 in the tenth concession of Murray (together with other lands) was issued to Wm. R. Caldwell on the 31st of October, 1817. Wm. R. Caldwell conveyed said lot 5 with other lands to the Hon. Geo. S. Boulton, and such lot 5 in the tenth concession was by the said Hon. Geo. S. Boulton surrendered to the Crown on the 20th of October, 1847—the original surrender being produced to me from the Crown Lands Department.

One George Potts of the township of Brighton, yeoman, then assuming to be the owner, made a conveyance dated the 10th of May, 1858, of the south half of lot 5 in the tenth concession to Wm. Bamber, which was registered on the 28th of September, 1858.

On the 1st of February, 1869, Wm. Bamber, leased to the plaintiff John Bruyea the north halves of lots 5 and 6 in the ninth concession, and the south half of lot five in the tenth concession of Murray for a period of three years.

Wm. Bamber died in 1879 intestate, leaving a family of ten children, one of whom is Jane Bruyea, wife of the plaintiff John Bruyea. Judgment.
MacMahon,
J.

The plaintiff John Bruyea since the lease to him of the above three parcels has purchased one of them, viz., the north half of lot 6 in the ninth concession from the heirs of the late Wm. Bamber.

The patent from the Crown issued on the 4th of January, 1865, to George German for the south part of lot 6 in the tenth concession of Murray, containing fifty-three acres lying south of the river Trent.

Geo. German conveyed the said part of lot 6, and also the east part of lot 7 in the tenth concession to Wm. J. Chadsay on the 16th December, 1886. And by a vesting order in the suit of *Chadsay v. Chadsay*, dated the 25th of January, 1881, the said part of lot 6, and said east part of lot 7 became vested in Patrick Turley who conveyed the same to the defendant Ellen Rose by deed dated the 6th of April, 1881.

The strip of land in dispute forms a part of that portion of said lot 6 in the tenth concession conveyed by Turley to the defendant Ellen Rose, and has a frontage of three chains twenty-eight links on the concession line between the ninth and tenth concessions, and running north twenty-two chains to the river Trent—which forms the northern boundary of the south part of the lot—and contains about six and one-half acres.

The plaintiff John Bruyea claims this strip as tenant under the lease from the Bambers.

There are no improvements on the south half of lot 5 in the tenth concession which is wooded land, and has been used by the plaintiff John Bruyea as a pasture field, his cattle crossing the concession line (which does not appear to have been fenced in on either side of the concession) from lot 5 in the ninth to lot 5 in the tenth concession.

It is stated by Jane Bruyea that when Wm. R. G. German lived on lot 6 in the tenth concession he and Wm. Bamber built a fence of brush and logs between the east half of

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MacMahon, claimed by Wm. Bamber.
J.

When the plaintiff John Bruyca was examined for discovery he said he never gave anything for the six and a half acres claimed, and he could not state whether the present line fence is east or west of where it is claimed the old line fence was. There is a good deal of difficulty in determining where the post indicating the boundary between lots 9 and 10 was placed, as at certain seasons of the year the land was drowned, and Bruyca represented to Jacob Terry and James German that the post placed there had floated away.

The title to the south half of lot 5 in the tenth concession is still in the Crown, and no one has been entered for that lot although numerous applications were made for a right to enter in the ten years between 1877 and 1887. And so long ago as 1859 an order in council was passed and published in that locality prohibiting squatters from trespassing on the Crown lands.

The fence which it is claimed was built by Wm. R. G. German and Wm. Bamber could not be considered as a line fence between the owners of adjacent lands as the Crown is still the owner of lot 5 in the tenth concession, and the title to the south part of lot 6 was in the Crown until January, 1865, when the patent therefor issued to Geo. German.

It is not in evidence who Wm. R. G. German was, or how he was in possession of this south part of lot 6.

John Bruyca when in the witness box said he claimed this land in dispute as tenant of the Bambers under the lease, and he made no other claim.

The argument of Mr. Dickson was that whether the title to lot 5 is in the Crown or not, the plaintiffs being in possession are entitled to maintain trespass on the authority of *Harper v. Charlesworth*, 4 B. & C. 574.

In *Harper v. Charlesworth*, the plaintiff was in actual possession with the concurrence of the Crown paying a nominal rent to the King. But as he occupied under a

parol license from the Crown, and the rent paid was much less than one-third the annual value of the land as required by 1st Anne ch. 7, sec. 5, he had no legal right to retain possession of the land as against the Crown, but as he occupied with the permission of the Crown his possession was sufficient to enable him to maintain trespass against a wrong-doer. And Bayley, J., said at p. 590: "If an information had been filed against him as an intruder, it would have been a good answer, in point of law for him to shew that by license from the Crown he was in possession and actual occupation of the land."

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The conclusion Bayley, J., reaches (p. 591), is "that actual possession of Crown land, with the consent of the Crown, is sufficient to entitle the party possessing it to maintain trespass against persons who have no title at all, and who are mere wrong-doers."

And Littledale, J., says, pp. 593-4: "In this case, the question was not whether the plaintiff had a legal title to the land, but assuming that he could not retain the actual possession against the Crown, the question was, whether he was entitled to that possession against a third person, as the Crown did not treat him as a wrong-doer."

In *Henderson v. McLean*, 8 C. P. 42, it was held that a purchaser from the Crown who held only a receipt for a portion of the purchase money without a license of occupation under the 6th section of 16 Vict. ch. 159, could not maintain trespass against a wrong-doer, Draper, C.J., in his judgment, at p. 45, referring to Plowden's reports, p. 546, as showing that the plaintiff could not have an action of trespass. But in the case of *Henderson v. McLean*, 16 U. C. R. 630, the Court dissented from the judgment of the Court in the case in 8 C. P. 42, by holding that the effect of the Act 16 Vict. ch. 159, did not disable purchasers of Crown lands who had taken possession, but not obtained a patent from protecting themselves against trespassers. And Robinson, C. J. in giving judgment in the case in the Queen's Bench, at p. 638, refers to *Harper v. Charlesworth*, 4 B. & C. 574, and says: "We think the effect of that

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decision is to shew that the ancient doctrine respecting intruders upon the possession of the Crown, cannot in reason be applied to such a case," (as he was considering) "for that a contracting purchaser holding possession with the concurrence of the Crown, cannot in any just sense be regarded as an intruder." See also *Glover v. Walker*, 5 C. P. 478; *Deedes v. Wallace*, 8 C. P. 385.

The result of the cases appears to be that where a person is in possession with the assent of the Crown, paying rent as in *Harper v. Charlesworth*, and is therefore not an intruder, or where a person is a purchaser, although the patent has not issued as in the cases cited from our own reports, such person can maintain trespass against a wrong-doer. See also *Graham v. Heenan*, 20 C. P. 340.

But the plaintiff's action is not for a trespass to lot 5 upon which he was an "intruder" as against the Crown, but in regard to part of lot 6 forming a portion of the whole land trespassed over by the plaintiffs in pasturing their cattle.

The title to this part of lot 6 being in the Crown until 1865, one of the questions to be considered is whether the plaintiff John Bruyea who claims to be lessee from Wm. Bamber, during his lifetime of the south half of lot 5 in the tenth concession under the lease of 1869, and since the latter's death in 1879 from his heirs, could—even supposing Bamber had been the owner of lot 5 in the tenth concession—have acquired title in himself by encroachment on this part of lot 6 as against the owner of the fee?

In *Smyth v. Leavens*, 3 U. C. R. 411 (decided in 1847), the Court held that where a landlord places a tenant in possession of lot No. 1, and the tenant knowingly incroaches on part of lot No. 2, to which the agreement as between himself and his landlord gives him no right whatever, that the tenant's occupation does not enure to create for the landlord a title to lot 2 by means of a twenty years possession of the lot.

In the present case Bruyea as tenant is only entitled under his lease to possession of the south half of lot 5 in

the tenth concession, and he does not pretend to claim as his own the strip of land in dispute, but only as forming part of the land to which the Bamber estate is entitled.

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MacMahon,
J.

Wm. Bamber one of the heirs at law of the late Wm. Bamber's estate, and whose evidence was taken *de bene esse* on behalf of the plaintiffs did not wish to be joined as a plaintiff in the action, nor had he been instructed by the other heirs for whom he was acting as agent to assent to their being joined as plaintiffs in the suit.

In *Doe dem. Baddeley v. Massey*, 17 Q. B. 373 (decided in 1851), the headnote is: "A tenant taking in land adjacent to his own by encroachment must as between himself and the landlord be deemed *prima facie* to take it as part of the demised land; but that presumption will not prevail for the landlord's benefit against third persons."

The possession of this strip—whatever such possession amounted to—was the like possession as the plaintiffs had of the south-half of lot 5, and this was simply by permitting the cattle to stray over from lot 5 in the ninth concession, to lot 5 in the 10th concession.

John Bruyeya paid taxes since 1869, on lot 5 although a Crown lot.

Bruyeya had promised two years before the defendants had moved the fence, to build a fence on the true line, but when the true line was to be ascertained, Bruyeya said he would have nothing to do with it, because the property did not belong to him.

I find that the line surveyed by Cyprean Caddy, and upon which the defendants' line is now built, is the true line between the south halves of lots 5 and 6 in the tenth concession, and corresponds with the survey made by Edward Caddy under instructions from the Crown Lands Department in 1865.

Lot 5 being in the Crown, and the plaintiffs being in possession in defiance of notice from the Crown against squatters, are there as intruders, and for the reasons stated, I consider they cannot maintain trespass—and there can be no question that they could not succeed in ejectment, a

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MacMahon, J. result sought by the action in claiming the line up to the fence now asserted by Bruyca as the boundary line. See *Jamieson v. Harker*, 18 U. C. R. 590; *Dowsett v. Cox*, *ib.* 594, and *Walker v. Rogers*, 12 C. P. 327. And this strip of land being in possession of the tenant by encroachment the tenant cannot claim it; nor does the tenant John Bruyca claim it as his own.

I cannot see that the addition to the action of Jane Bruyca one of the heirs of Wm. Bamber as a party plaintiff can assist in making the claim successful. See *Doe d. Baddeley v. Massey*, 17 Q. B. 373.

The plaintiffs' action must be dismissed with costs.

A. H. F. L.

[CHANCERY DIVISION.]

MACKLIN V. DOWLING.

Sale of land—Title to land—Private Acts—Equitable interest—Person not named in Private Act—Canada Agency Association—Colonial Securities Company—32 Vic. ch. 62, sec. 5, (O.)—36 Vic. ch. 121, sec. 5, (O.)—R. S. O., 1887, ch. 1, sec. 8, subs. 47.

On a reference as to title to land, it appeared that one H. entrusted certain moneys to a Loan Association to invest for her on mortgage, under an agreement that the Association should guarantee to her payment of interest at seven per cent, and in consideration thereof should retain to their own use all interest over that rate. The mortgage, which recited the said agreement, was taken to the trustees appointed by the Association, and was made in 1861. By 32 Vict. ch. 62, sec. 5, (O.) all lands, mortgages, &c., held by trustees of the Association were to be deemed vested in the C. S. Company, so that the same might be sold, assigned, &c., by the latter. Subsequently the mortgagor released his equity of redemption to the C. S. Company, in full satisfaction of the mortgage moneys, but not so as to merge the mortgage. By 36 Vict. ch. 121, sec. 5, (O.) all lands, mortgages, &c., held by the C. S. Company, were to be deemed vested in the C. T. Company, so that the same might be sold, assigned, &c., by the C. T. Company. Afterwards the latter company conveyed the lands to the vendor.

Held, that, inasmuch as the above Acts made no mention of H., the vendor could not make a good title free from her claim, who, unless the moneys advanced by her had been repaid, was in equity substantially the owner of the mortgage, and if she chose to adopt the act of the trustees in taking a conveyance of the equity, then of the land.

THIS was an appeal by the defendant from the report *Statement* of the Local Master at Hamilton, made pursuant to a reference as to title in an action for specific performance of a sale of lands, and under circumstances set out in the judgment.

The matter came on for argument on April 22nd, 1890, before FERGUSON, J.

Bicknell, for the defendant. Trustees invest money upon a mortgage to themselves as trustees, and afterwards acquire the equity of redemption by release from the mortgagor, because he was in default. The vendor makes title through these trustees. I say they have no power of sale and cannot convey more than the legal estate. The trustees had power to invest in this mort-

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gage, I do not dispute, but that is all that appears. The trustees conveyed by a simple deed, dealing with the land as absolute owners. That is not a good title. We must have the equitable estate got in. As to 32 Vict. ch. 62, (O). that Act could not transfer anything except what the Canada Agency Association were beneficially entitled to. Miss Hill is not named, though her rights are affected. 31 Vict. ch. 1, (O)., sec. 7, sub-sec. 31, is the Interpretation Act, which was in force when the 32 Vict. ch. 62, (O)., was passed. It says rights shall not be affected unless parties are named. I refer also to *Re Goodhue*, 19 Gr. at pp. 422, 426, 428, 429, 439, 448, 450; Lewin on Trusts, 8th ed., pp. 192, 193, 332, 460, 858; and *Prideaux Prec. in Convey.* 14th ed., vol. i, p. 535; *In re Harman and Uxbridge and Rickmansworth R. W. Co.*, 24 Ch. D., 720.

Bruce, Q. C., for the plaintiff. Miss Hill was not interested in the land, but only in the money, and if she got her money back which she advanced, the company, represented by Buchan and Ridout, would be entitled to any surplus. This appears clearly from the mortgage to Buchan and Ridout. It is clear that Miss Hill from the inception of the matter, was trusting in the Canada Agency Association, and it is nearly thirty years ago. Upon this point, I refer to *Lord Braybrooke v. Inskip*, 8 Ves. at p. 432. Miss Hill never became *cestui que trust* as to the land. We rely on the provisions of the Act as to payment of money on mortgages, R.S.O. 1887, ch. 102, sec. 15. [FERGUSON, J.—The most that can be said is, that Miss Hill in equity had an incumbrance on the land, and that is not a matter of title but of conveyance.] Yes. See *Graham v. Stephens*, 27 Gr. 434, per Blake, V. C. We also refer to R. S. O., 1887, ch. 110, sec. 8, as to the position of trustees and executors. The release of the equity of redemption recites this mortgage and another mortgage. These lands were not conveyed to Ridout and Buchan as trustees for Miss Hill, nor was the mortgage made to them as trustees for her but for the Association. There was no privity between

Ridout and Buchan and Miss Hill. I also object that ^{Argument.} these points have already been disposed of upon an appeal from a certificate of the Master in September, 1888; *Wyman v. Carter*, L. R. 12 Eq. 309; *Tomlin v. Budd*, L. R. 18 Eq. 368; *Monro v. Taylor*, 8 Ha. 51, S. C. in App. 3 MacN. & G. 713; *Carrodus v. Sharp*, 20 Beav. 56; *Long v. Collier*, 4 Russ. 267.

Bicknell, in reply. My main point is, that the trustees by taking a release, were in the same position as if they had foreclosed and held it in trust.

May 12th, 1890. FERGUSON, J. :—

The action is upon an agreement for the purchase and sale of lot No. 372, on the east side of Valley street, in J. C. Macklin's survey in the city of Hamilton. The agreement bears date July 5th, 1877. The plaintiff was the vendor and the defendant the purchaser.

The judgment pronounced at the trial is not before me, but I am told, and no doubt such is the fact, that it was a judgment for specific performance of this agreement if the plaintiff could make a good title, with a reference to the Master at Hamilton as to the title.

The learned Master has reported that a good title can be made to the lands in question, having regard to the terms of the agreement.

I do not see anything in the agreement as set forth in the pleadings, having the effect of compelling the defendant to take anything less than a good title.

The learned Master has also reported that it was first shown that a good title could be made on or about the 21st day of June, 1888.

The report also finds the amount to be paid by the defendant, and besides contains many special findings reported apparently at the instance of the plaintiff's solicitor.

The case was before me on a former appeal, (which was from a certificate of the local master), on the 20th day of

Judgment. September, 1888. The order drawn up upon that appeal, Ferguson, J. appears to be misleading. I find by my notes of the case and a short memorandum of the conclusion at which I arrived, that the whole of the then contention was in respect of a ground of appeal thus stated in the notice of appeal: "The recital of the seizure in fee, is not such a recital of fact or matter as to justify the plaintiff in refusing to abstract the earlier title."

My opinion was against the appellant upon this ground, and I think this was substantially all that was really determined. Owing to what passed between counsel, the other grounds of appeal were not really argued or considered or determined upon. At all events, this is my recollection and belief after a perusal of my notes, &c. The notice of the present appeal states many grounds of appeal. Counsel for the appellant, however, said that his main objection to the title was that there is an existing trust of this land in favour of one, the Hon. Emily Noell Hill, and that a sale and conveyance, of the land forming a link in the chain of the plaintiff's, (the vendor's) title was without the consent of this *cestui que trust*, and without any power of sale.

The respondent's counsel said that, should my opinion be against his client on this subject, he asked a reference back to the Master for the purpose of showing that all claims of this *cestui que trust*, the Hon. Emily Noell Hill were long since satisfied, and that she really had not at the time of the sale referred to, and has not now any claim or demand whatever in regard to the subject matter, saying also that this was the more important to his client the plaintiff, because many other parcels of land were in the same or much the same position with regard to title.

There was contention as to the meaning of certain Acts of the Legislature—namely, 32 Vict. ch. 62, sec. 5, (O.), and 36 Vict. ch. 121, sec. 5, (O.), which contention, in certain events, it might become unnecessary to determine upon or decide; and for these reasons it will, I think, be convenient to consider, first, this matter of the alleged trust.

The land in question is a small portion of a very large quantity of land embraced in a mortgage from the late Hon. Malcolm Cameron and wife, to the late Thomas Gibbs Ridout and David Buchan, trustees appointed by the directors of the Canada Agency Association, limited. This mortgage bears date the 4th day of May, 1861, and is or was to secure the sum of \$7,430, with interest, at the rate of eight per cent. per annum, payable half yearly in advance. The principal money was according to the terms of the mortgage, payable on the 1st day of April, 1866. The mortgage recites the incorporation of this Association and the purposes thereof, in a general way, stating that these or some of them were, with a view to the promotion of emigration and the investment of moneys in Canada, and for the transaction of all kinds of agency business between Canada and the United Kingdom.

It also recites that the Hon. Emily Noell Hill of the county of Salop, England, (thereinafter called the lender) through the Association as her agents, had agreed to advance to the mortgagor this sum of \$7,430, upon the security of the lands described in the mortgage, and upon the terms therein set forth.

It recites also an agreement between the Association and the lender, that the Association should guarantee and become liable to the lender in the city of London in England, for the payment of interest half yearly, at the rate of seven per cent per annum, on the sterling money advanced by her equal in value to the said sum of \$7,430 ; and that in consideration thereof the Association should recover for their own use, all interest secured by the mortgage over and above this seven per cent. per annum ; and that the security for "the said money so invested," should be taken to and vested in trustees as in the mortgage, appears instead of in the lender.

This mortgage money, as before stated, fell due on the 1st day of April, 1866. On the 23rd day of January, 1869, 32 Vict. ch. 62, sec. 5 (O.), was passed. The section provides as follows : " All lands, mortgages, securities, leases, bonds,

Judgment.
Ferguson, J.

Judgment. or other instruments held by or in the name or names of
Ferguson, J. the trustee or trustees of the Canada Agency Association
(Limited), or of the Colonial Securities Company (Limited),
respectively, shall be deemed and taken to be vested in
the Colonial Securities Company (Limited), so that the
same may be sold, assigned, conveyed, collected, realized,
dealt with, released or discharged by the Colonial Securities
Company (Limited) under the provisions of this Act," and
on the 23rd day of September, 1872, the mortgagor,
Malcolm Cameron, granted and released his equity of
redemption in these and other lands to the Colonial
Securities Company (Limited), the document reciting the
passing of the Act, and that by virtue thereof this company
became entitled to the mortgages mentioned in the docu-
ment of release, and to the rights, interests, and benefits of
Thomas Gibbs Ridout and David Buchan therein and
thereunder.

This document of release states on its face that it is in
full satisfaction and discharge of the mortgage moneys
secured by the two mortgages before mentioned in it (one
of them being this mortgage), but nevertheless so that the
grant and release should not operate by way of merger of
the mortgages, and in order that they might be deemed
and continue valid and existing securities as against other
incumbrances and claims, and also that these mortgages
had been assigned by deed intended to bear date and take
effect prior to the execution of the document of release to
Adam Crooks and Richard John Uniacke Chipman in trust
to attend the inheritance of and in the lands.

A copy of this assignment is produced. It bears date
the 20th day of September, 1872. On March 29th, 1873,
the 5th section of 36 Vict. ch. 121 (O.), was passed. The
provision is : " All lands, mortgages, securities, leases, bonds,
or other instruments held by or for the Colonial Securities
Company (Limited), or the Colonial Trusts Corporation
(Limited), respectively, shall be deemed and taken to be
vested in the Colonial Trusts Corporation (Limited), so that
the same may be sold, assigned, conveyed, collected, realized,

dealt with, released or discharged by the Colonial Trusts Corporation (Limited), under the provisions of this Act," &c. Judgment. Ferguson, J.

On the 12th day of January, 1878, the Colonial Trusts Corporation (Limited) by deed of bargain and sale conveyed or professed to convey the lands in question, amongst other lands, to the plaintiff, the present vendor, his heirs and assigns for the consideration of \$5000.

It was contended that the earlier one of the statutes above referred to is insufficient to operate the transfer which it was admitted must have been intended by the Legislature in passing the Act, and that neither of the Acts could affect the rights or interests of the Hon. Emily Noell Hill even to the extent of changing the trustees or appointing new trustees for her, the Acts being in the nature of private Acts, and her name not being mentioned in them, or either of them, and for this contention the 31st clause of section 6 of 31 Vict. ch. 1, (O)., was relied upon. In *Re Goodhue*, 19 Gr. 366, was also referred to in this contention.

The mortgage for \$7430 embracing this land was beyond all question a mortgage in trust for the Hon. Emily Noell Hill. It matters not, I think, for the purposes of the rights under such trust, that it was, or may have been, to a small extent, in trust for another or others. She was confessedly the lender, the one who through her agents advanced the mortgage money, this large sum, and she was in equity substantially the owner of the mortgage. If there had been no change of trustees at all, and the mortgagor had, instead of paying the mortgage money according to the provisions in that behalf in the mortgage conveyed the equity of redemption in the land to the trustees, the *cestui que trust* might of course complain of the act of her trustees in taking a conveyance of the equity of redemption instead of pursuing the well known remedies upon the mortgage, but if she chose to adopt the transaction made by the trustees in taking the conveyance of the equity the land would then belong in equity to her. It would stand instead of the mortgage, and all the rights

Judgment. and remedies upon or in respect of it as the consideration
Ferguson, J. to her for the money that she had advanced.

If the conveyance of the equity of redemption were taken in a manner so as to prevent a merger, she would in equity be the owner of the mortgage and also of the equity of redemption; and I do not perceive any difference in this respect that could have been occasioned by a change of trustees, assuming that there was a change or changes that was or were valid and binding upon her. This is, however, assuming that there was no settlement or payment, or satisfaction of her claim in respect of the mortgage money by her agents or trustees, and it is not at present known how this is.

The trust in her favour is an express trust. The Statute of Limitations did not run against her. Assuming the enactments that have been referred to have all the force contended for by the plaintiff, they could not have, nor could they have been intended to have the effect of operating the destruction of the rights of the *cestui que trust*, whose claim and right, assuming it to be still existing, is not confined to the mortgage money and the interest thereon. She would, in such case, be in equity entitled, adopting the transaction of her trustees in taking the release, to the land, or to the mortgage plus the equity of redemption in case there was no merger.

In any view that I am able to take of this matter, there is, if Miss Hill's claim has not been satisfied, an equitable interest outstanding in her which is not necessarily a matter of encumbrance or conveyancing, but a matter of title, as such being an equitable right to the land itself or to the mortgage, plus the equity of redemption, as the case may be.

As I understand the matter, I think a good title has not been shown, and in saying this, I confine my remarks to the one matter—namely, this equitable interest or estate outstanding in Miss Hill if her claim has not been satisfied in some way.

It is, therefore, I think, all important that it should be

made to appear whether or not there has been a satisfaction of her claim or right; and as counsel for the plaintiff asked a reference back to the Master for the purpose of showing how this matter is, if I should be of this opinion, I think there should be such reference back for that purpose. Judgment.
Ferguson, J.

The matter is very old indeed, and possibly, nay probably, Miss Hill's claim was long ago fully satisfied, and should this turn out to be so, some, if not many of the other questions that were raised, may dissolve and vanish without further contention or trouble. It will be borne in mind that I decide but the one thing, and order the reference back above mentioned.

As to the costs. The appellant is an unwilling purchaser, confessedly making all the trouble as to the title that he possibly can. This, of course, he has the right to do. The costs will be reserved to be disposed of after a further report, when the whole of the facts will, I hope, appear.

Under the circumstances, I need, of course, say nothing as to the motion on further directions.

Order accordingly.

A. H. F. L.

[CHANCERY DIVISION.]

THE CANADIAN BANK OF COMMERCE V. GEORGE MARKS
ET AL.*Partnership—Change of firm—Novation—Privity.*

A certain firm was indebted to the plaintiffs. Another firm, bearing the same name, but composed of different individuals, assumed its liabilities, as between itself and the former firm, and continued the business, and made certain payments to the plaintiffs, and also asked for time to pay the balance. There was no evidence of any assets of the first firm being taken over by the second.

Held, that the above was not sufficient to create a new obligation as between the plaintiffs and the new firm.

Henderson v. Killey, 14 O. R. 149, and in appeal before the Supreme Court, unreported, cited and relied on.

Statement.

THIS was an action brought by the Canadian Bank of Commerce against George Marks and James B. Dobie, formerly trading under the name of Marks, Dobie & Co.; Samuel Marks, and James B. Dobie, trading under the name of Marks, Dobie & Co.; John S. Playfair, and St Clair Balfour, in reference to the balance due in respect of certain promissory notes under circumstances thus set out in the statement of claim: that the promissory notes in question were made by the defendants George Marks and James B. Dobie, when they were carrying on business as Marks, Dobie & Co.: that after the plaintiffs became the holders of the notes, George Marks retired from the said firm of Marks, Dobie & Co., and the defendants Samuel Marks and James B. Dobie, thereafter continued in business under the same firm name, and took over the assets and assumed the liabilities thereof, and agreed to indemnify George Marks therefrom: that in July, 1889, Samuel Marks and James B. Dobie, trading as aforesaid, made an assignment of all their estate and effects for the benefit of their creditors to the defendant Balfour: that in the same month George Marks made an assignment of all his estate and effects for the benefit of his creditors to Playfair: that Balfour disputed the right of the plaintiffs to rank on the estate of Marks, Dobie & Co., in his hands, in

respect of their claim in this action, and Playfair disputed their right to rank on the estate of George Marks; and the plaintiffs claimed judgment against George Marks, Samuel Marks, and James B. Dobie for the balance due in respect of the notes, and a declaration that they were entitled to rank on the estates of Marks, Dobie & Co. and George Marks, for the amount of their claim, Statement.

The remaining facts of the case and the evidence adduced, so far as is necessary to the present report, are set out in the judgment of BOYD, C.

The action came on for trial at Toronto, on April 28th, 1890, before BOYD, C.

W. Cassels, Q. C., for the plaintiffs.

Laidlaw, Q. C., for the defendant Playfair.

J. J. Scott, for the defendant Balfour.

The following cases were referred to on the argument : R. S. O. 1887, ch. 124, sec. 5 ; *Rolfe v. Flower*, L. R. 1 P. C. 27 ; *Lindley on Partnership*, 5th ed., p. 208 ; *Henderson v. Killey*, 14 O. R. 149, and in Supreme Court, not yet reported ; *Daniel v. Cross*, 3 Ves. 277 ; *Ex parte Parker*, 2 M. D. & D. 511.

June 4th, 1890. BOYD, C. :—

The plaintiffs are creditors of Marks, Dobie & Co., *i. e.*, the first partnership of which George Marks was a member. They still remain creditors of his firm, and assert this to be their position both by pleadings and evidence. In course of time a new partnership was formed, under the same name, in which Samuel Marks took the place of George who retired. This second firm was, by arrangement, in the articles of partnership, to pay the debts of the first partnership, which would include the plaintiffs' claim. There is no evidence as to there being any assets of the first firm taken over by the second, and no evidence

Judgment.

Boyd, C.

of any direct assumption of liability on the part of the second firm in dealing with the plaintiffs. The only evidence bearing this way is that of certain payments being made by the second firm to the bank, in respect of the existing liabilities of the first firm. I cannot find evidence sufficient to create a new obligation as between the plaintiffs and the second firm; any payments made being explicable by the 'internal arrangement existing between the two partnerships, and not as the result of direct privity of obligation between the second firm and the plaintiffs. In the same way the correspondence asking for time, probably arose from a mistake of law on the part of the second firm, and is not enough to create a new contract for valuable consideration to pay to the plaintiffs as creditors. The whole dealing is properly referable to the obligation which the second firm had with the first, *i. e.*, to indemnify them against the debt. This element of asking time existed in *Henderson v. Killey*, 14 O. R. 149, 152, and was there thought sufficient to give a new right of action, but this view was overruled by the Supreme Court—though I have searched the reports and legal periodicals in vain to find any record or even hint of this final decision.

This case is not one of continuation of business with the new firm by which a series of transactions becomes common, as it were, to both concerns. In such interweaving of business dealings, but slight evidence is needed to show a substitution of debtors. Here, however, the transaction is single, ending with the old firm. The intercourse between the new firm and the bank is merely in the way of reducing that undertaking or obligation which the new concern had assumed as between themselves and the former partnership. The statement of law applicable to the position of the parties, appears to be more clearly enunciated by Lord Selborne, in *Scarf v. Jardine*, 7 App. Cas. 351-2, than in any other decision I have seen.

The action fails, and should be dismissed with costs to the assignees for creditors.

A. H. F. L.

[CHANCERY DIVISION.]

THE CORPORATION OF THE CITY OF KINGSTON V. THE
CANADA LIFE ASSURANCE COMPANY.

Assessment and taxes—Life Insurance Company—Head office and branch office—Meaning of “branch” or “place of business” in Assessment Act—Assessment of income at branch office—“Personal property”—R. S. O. 1887, ch. 193, sec. 2, sub-sec. 10, secs. 34-35.

The defendants were a life insurance company with their head office at H., in this Province, and transacted business by agents in K., who received applications for insurances which they forwarded to the head office, from which all policies issued ready for delivery, the premiums on the same also being collected by the agents in K. In an action by the corporation of the city of K., to recover taxes, assessed against the defendants on income, it was contended that the defendants' only place of business was in H. and that their business was of such a nature that they could not be assessed at K., and that they had elected under R. S. O. 1887, ch. 193, sec. 35, sub-sec. 2 to be assessed at H. on their whole income.

Held, reversing the decision of FERGUSON, J., 18 O. R. 18, that the agency at K. was not a branch business within the meaning of sec. 35 above referred to, and that the premiums received year by year at K. were not assessable there.

The ultimate profit represents the year's taxable income under the statute, but this could only be ascertained by placing the sum total of gains and losses against each other, together with the result of the volume of business done at the head-office, and no distinct integral part of this income was referable to the K. agency.

Semble, also, that notwithstanding sub-sec. 10 of sec. 2, “personal property” in sections 35 and 36 of the above Act is intended to cover only something readily and specifically ascertainable, and “income” an intangible and invisible entity is not to be read into these provisions of the Act.

Lawless v. Sullivan, 6 App. Cas. 373, specially referred to.

THIS was a motion made to the Divisional Court by way of appeal from the judgment of FERGUSON, J., reported 18 O. R. 18, where the circumstances are fully set out. Statement.

The motion came on for argument before BOYD, C., and ROBERTSON, J., on December 11th and 12th, 1889.

McCarthy, Q. C., for the defendants. The defendant company never had a place of business at Kingston. They had an agent who solicited business, and received applications for insurance on life. He received the first premium only and forwarded applications to Hamilton. See Assess-

Argument.

ment Act, R. S. O. 1887, ch. 193, sec. 2, sub-secs. 10, 7, secs. 21-3, 34, 35, sub-sec. 2. The company elected to be assessed at Hamilton, and a certificate to that effect was produced to the authorities at Kingston. The company's head office is at Hamilton, and they have not more than one place of business. No income in any way belongs to the Kingston office. There are 260 agencies of the company, and that at Kingston could not be separated so as to ascertain the income from that office. The profits which are the net income, are arrived at by deducting the payments made and the sums to be retained for liabilities. Income is indivisible and appertains to the head-office only. Again, gross receipts are not assessable as income: *Gilbertson v. Fergusson*, 7 Q. B. D. 562, 570; *Lawless v. Sullivan*, 6 App. Cas. 373; Maxwell on Statutes, 2nd ed., pp. 67, 74. "Branch" and "place of business," are interchangeable expressions, and the part must be complete in respect to the transaction of business though subordinate: *Werle & Co. v. Colquhoun*, 20 Q. B. D. 753, 761. The learned Judge attributed more force to the schedules of forms to the Assessment Act, than to sec. 31. Sec. 64, sub-sec. 14, has not any enlarging effect by proper construction. "Gross" in Schedules D., E., and G., means "aggregate." The schedules cannot enlarge the words of the statute: *Lawless v. Sullivan*, 6 App. Cas. 373; *Le Tailleur v. South Eastern R. W. Co.*, 3 C. P. D. 18; *Last v. London Assurance Corporation*, 10 App. Cas. 438; *New York Life Ins. Co. v. Styles*, 61 L. T. N. S. 201; *Attorney-General v. Alexander*, L. R. 10 Ex. 20.

Bruce, Q. C., on the same side. There are important differences between Fire and Life Insurance business: *Last v. London Assurance Corporation*, 12 Q. B. D. 389; *The Corporation of the City of Brantford v. Ontario Investment Co.*, 15 A. R. 605. We are assessed for our whole income at Hamilton, *i. e.*, the amount that comes to the shareholders. By 12 Vict. ch. 168, our Act of incorporation, our head-office is fixed at Hamilton. As to sec. 35, sub-sec. 2, it only applies to tangible property. In

addition to the cases already cited, I refer to *The Mersey* ^{Argument.} *Docks and Harbour Board v. Lucas*, 8 App. Cas. 891; *Regina v. The Commissioners of the Port of Southampton*, L. R. 4 H. L. Cas. 449; *Nickle v. Douglas*, 35 U. C. R. 126; 37 U. C. R. 51; *The Cesena Sulphur Co. v. Nicholson*, 1 Ex. D. 428, 445; *Ex parte Charles*, L. R. 13 Eq. 638; *Attorney-General v. Sulley*, 4 H. & N. 769, 5 H. & N. 711; Angell and Ames on Corporations, 10th ed., sec. 107.

Walkem, Q. C., for the plaintiffs. The only material question is, whether there is at Kingston a branch of the defendants' business or not. All other questions belong to the Court of Revision and the County Judge: *The Corporation of the City of Brantford v. Ontario Investment Co.*, 15 A. R. 605; *London Mutual Ins. Co. v. City of London, ib.*, 629; *Canadian Land and Emigration Co. v. The Municipality of Dysart et al.*, 9 O. R. 495, 12 A. R. 80. The defendants are clearly assessable on the whole of the profits they have made, whether payable to policy holders or shareholders. Here the company only pays on the share of the profits, which goes to the shareholders. The business at Kingston is a branch business: *Werle & Co. v. Colquhoun*, 20 Q. B. D. 753. Sec. 41 of the Assessment Act gives the right to assess the defendants as trustees for the policy holders, (and not merely debtors) to the extent of 90 per cent. of the profits which go to the policy holders at Kingston.

Langton, on the same side. It is certain that the public who wish to deal with the company, can do all that is needed to be done by them at Kingston. R. S. O. 1887, ch. 193, sec. 31 justifies taxing personal property, less the expense of earning it, and the money received by the agents at different places, less the expense of earning it at each place, is what should be assessed. Sec. 64, sub-sec. 14, explains sec. 31. The premiums belong to the company as their property and are to be assessed less the expense of getting them in. The payments out for death are in the nature of debts paid, and should not

Argument. be first deducted. *Lawless' Case* is, that of a bank, and is therefore distinguishable. It proceeds upon a statute where income is defined as annual profits. What we seek to tax is not profits. Sec. 131 of R. S. O. 1887, ch. 193, is the section under which the action is brought. I refer also to Cooley on Taxation, 2nd ed., pp. 221, 386.

Bruce, in reply. We are not assessed at Kingston on "personal property" at all, but on "income" as appears by the Assessment Roll. We say "income" is that which is owned by the shareholders, or that which comes to them only, and not to the company. See Harrison's Municipal Manual, notes to secs. 34, 35. Income is defined by *Lawless v. Sullivan*, 6 App. Cas. 373; see *London Mutual Ins. Co. v. City of London*, 15 A. R. at p. 636. The right of election is with the party assessed and not with the municipality. The company had no office of their own at Kingston. It was in some other person's place, for which the company paid no rent, and where they had no personal property. "Income" must depend on the results of the business of the whole company every where, and cannot be apportioned to branches. Sec. 7, sub-sec. 15 shews that personal property is distinguished from "income" that is subject to assessment.

June 9th, 1890. BOYD, C.:—

My brother Ferguson has come to the conclusion that the amount of premiums received yearly at Kingston in the agency office there of the defendants was assessable at that place as "gross" income. This question, I incline to think, is at the bottom of the litigation before us, and the solution of what is meant by "income," will go far to solve the whole matter in controversy. The provisions of the Assessment Act as to the taxation of corporations, are very meagre, and consist of a short section of the statute, R. S. O. 1887, ch. 193, sec. 34, whereby they are put on the footing of unincorporated partnerships. The matter of the taxation of corporations has received and is receiving very

special attention in the different States of the adjoining Republic, and in many of them the system of levying taxes on gross receipts for premiums, and other like sources of income has been adopted. Our statute does not make any plain distinction between income tax properly so called and a rate levied upon personal property—though these are becoming broadly contrasted by social economists. The assessments here imposed were, in respect of “income” only, and not in respect of personal property, or of income and personal property. The distinction is, I think, material in view of the application of the statute as it is framed. “Income” is not perhaps the most appropriate word to use with reference to corporations, but being used for convenience or for comprehensiveness, it must receive the meaning which “income” has in connection with individuals or partnerships. Whatever difficulty one might have in arriving at a conclusion as to this word in its statutory signification, has been obviated by the judgment of the Privy Council in *Lawless v. Sullivan*, 6 App. Cas. 373, which was upon a fiscal statute using very much the same collocation of words as are found in the Ontario Assessment Act. Sir M. E. Smith, who read the judgment, said, at p. 378: “There can be no doubt that in the natural and ordinary meaning of language, the income of a bank or trade for any given year, would be understood to be the gain, if any, resulting from the balance of the profits and losses of the business in that year. That alone is the income which a commercial business produces, and the proprietor can receive from it.” He then considers the context of the Act—refers to the use of such words as “net profits,” suggesting that “income” was to be distinguished from net profits; and, also, “the whole amount of income,” which it appears, was an expression that guided the Courts below (See *Sullivan v. Robinson*, 1 P. & B. 431; *Ex parte Lawless*, 2 P. & B. 520, and *Lawless v. Sullivan*, 3 S. C. R. 117), and comes to the conclusion that these considerations have not “sufficient cogency to justify an interpretation being given to the word “income,” as ap-

Judgment.

Boyd, C.

Judgment.
Boyd, C.

plied to a commercial business, other than which it naturally bears," at p. 382. The judgment then is definitively and conclusively upon this point, that "income," as commercially used, means the balance of gain over loss in the fiscal year or other period of computation. Now there is no context in the Assessment Act of more controlling force than the expressions "net profit" and the "whole amount of income." The epithet "gross," referred to, and emphasized by my brother Ferguson in sec. 31, and in some of the schedules to the Act, is, in one of its common meanings, synonymous with "whole" or "total." The term "net," is used in connection with personal property in the same section. But I see nothing to detract from the ordinary commercial meaning attributable to the word "income," as defined by the highest appellate tribunal of this country.

This item of assessment being ascertained, I think it is obvious that the business of the company was so conducted that no distinct integral part of income is referable to the Kingston agency. There may be loss or extreme outlay at one agency—there may be nothing but gain at another—but it is the sum total of their gains and losses placed against each other, together with the result of the volume of business done at the head office, which will show whether there has been profit or not at the end of the year's transactions. The ultimate profit (if any) represents the year's taxable "income," as I understand the statute, read by the light of the decision in *Lawless v. Sullivan*. See also *Russell v. Town and County Bank*, 13 App. Cas. 421 and 429.

Now, "income" is ascertained at the head office, and it is not in the ordinary course of business afterwards apportioned so much to each agency; nor do I think the statute contemplates this—a thing practically impossible for the company to do, and utterly impossible for the assessor to verify.

I have assumed that the business of a life insurance company can be so adjusted that each year will repre-

sent its own annual income. This was for the purpose of presenting this issue in its simplest form. It may well be however that no reasonable or even approximately accurate ascertainment of yearly profits can be reached unless upon a system of averages which would cover a quinquennial or lesser period. With this, however, I am not at present concerned. I only advert to it to indicate what difficulties may arise in assessing such companies as individuals on the footing of "income" as such. Probably this is one reason why the taxation in several of the American States is upon the gross receipts of trading or business corporations in which the totals are readily ascertainable, and the facility of minimising results, does not obtain, as in the case of net revenue.

Judgment.

Boyd, C.

These considerations go far to solve the next point to be dealt with—namely, whether this Kingston agency was a branch business within the meaning of the 35th section. The question is, whether Kingston was a branch at which any sum arbitrary or otherwise could be assessed as "income." In my opinion it was not. Sec. 35, subsec. 2, contemplates the case of a partnership having two places of business in different localities, which may be spoken of as "branches" *inter se*, and with personal property belonging to each branch. The section is *in pari materia* with that which follows, section 36, as to an individual carrying on two places of business in different municipalities; and it refers to the personal property connected with the business carried on at each place. The "branch" analogy does not well apply to the business of a corporation like this with head-office fixed by statute at Hamilton, at which point in fact all business is passed upon, regulated and controlled. The different local agencies, like Kingston, to send in applications for insurance, and to collect premiums to be remitted to the central office, may be "feeders" to the great trunk, but with such slight organization can hardly be regarded as "branches" of the concern. As said by Blackburn, J., in *Re Brown v. London and North Western R.W. Co.*, 4 B. & S. 326:

Judgment. “Generally speaking, a man carries on his entire business
Boyd, C. where the general superintendence of it is,” at p. 335.

There is a clause in the Compiled Laws of 1871, for the State of Michigan, ch. 21, sec. 978, very much the same as that I am now dealing with. It reads: “Partners in mercantile or other business, whether residing in the same or different townships, may be jointly taxed under the partnership name in the township where their business is carried on, for all the personal property employed in such business; and if they have places of business in two or more townships, they shall be taxed in those townships for the proportion of property employed in such townships respectively. The meaning of this legislation is thus defined in *Putman v. The Township of Fife Lake*, 45 Mich. 125: “In making the property taxable away from the owner’s residence, as belonging to an independent enterprise having a local centre, the law refers to an actual business seat or establishment capable of being contemplated as a local concern possessing an identity of its own. It was not intended to include the numberless activities and operations constantly going on in all directions, and which lack this local fixed and individual character. To have done so, would have resulted in unparalleled confusion.” This exposition of the law was acted on as correct in a later case: *McCoy v. Anderson*, 47 Mich. 502, 504, and was recognized as correct by the Legislature by the subsequent extension of the law in 1882, as pointed out in *Hood v. Judkins*, 61 Mich. at p. 580, (1886.)

Regarding the meaning of the words “personal property,” in secs. 35 and 36, I am of opinion that the context shews that something readily and specifically ascertainable is intended. Property is contemplated that has a visible status “belonging to” or “or connected with” the particular business; and “income,” an intangible and invisible entity, is not to be read into these provisions of the Act. “Personal property,” by the interpretation clause, is not to have this comprehensive and inclusive meaning in case a contrary intention appears. To my

mind the argument *ab inconvenienti* applies cogently to
exclude "income" as an item of "personal property" to
be assessed at a "branch" which is entirely in subordina-
tion to the principal seat of business.

Judgment.

Boyd, C.

For these reasons, I have reached the conclusion that
there is no valid claim, and that the action should be dis-
missed with costs.

ROBERTSON, J., concurred.

[QUEEN'S BENCH DIVISION.]

WESTERN ASSURANCE COMPANY v. ONTARIO COAL
COMPANY.

Insurance, Marine—General average contribution—Attempt to rescue vessel and cargo—Common danger—Average bond—Adjustment—Expenditure—Liability of owners of cargo.

A vessel loaded with coal stranded under stress of weather, and was abandoned as a total loss to the underwriters, the plaintiffs. The owners of the cargo, the defendants, proposed to unload at their own expense, but the plaintiffs refused to permit this and would not allow the defendants to get the cargo without signing an average bond. Upon this the defendants signed a bond² which was *ex facie* imperfect, and the plaintiffs took steps to save vessel and cargo by one expedition. They failed to rescue the vessel, but saved the larger part of the cargo. They now claimed upon adjustment contribution from the defendants for the expenditure incurred, which was in excess of the value of the salvage :—

Held, that the vessel and her cargo were not when stranded in a common danger, and the expenditure was not for the preservation and safety of both ship and cargo, but for the deliverance of the vessel alone; that the average bond signed did not bind the defendants to pay more than they were rightfully liable to pay, and the adjustment was no obstacle to the determination of the real liability; and that the defendants were liable only to pay what they would have paid to recover the cargo by their own exertions.

Statement.

THIS was an action to recover the sum of \$2,314.45 as the defendants' contribution to an expenditure of \$2,551.98, made by the plaintiffs in endeavouring to save the schooner "*Gleniffer*," which was stranded in the Humber bay, a few miles from Toronto, on the 27th November, 1889, and her cargo of coal.

The plaintiffs were the underwriters of the vessel, which was abandoned to them, and the defendants were the owners of the cargo.

Under the circumstances set out in the judgment, an average bond was signed by the managing director of the plaintiffs on their behalf, and by the treasurer of the defendants on their behalf, in the following terms :—

"Whereas the schooner *Gleniffer*, whereof Captain Robertson is master, having on board a cargo of coal, sailed from the port of Oswego on or about the 23rd day of November,

1889, bound for Toronto, and in the prosecution of her said ^{Statement.} voyage " (here followed a blank) " by which means certain losses and expenses have been incurred, and other expenses hereafter may be incurred in consequence thereof, which (according to the usage of this port) constitute a general average, to be apportioned on said vessel, her earnings as freight, and the cargo on board : Now we, the subscribers * * do hereby * * covenant and agree to and with each other * * that the loss and damage aforesaid, and such other incidental expenses therein as shall be made to appear to be due from us * * shall be paid by us respectively according to our parts or shares in the said vessel, her earnings as freight, and her said cargo, or our interest therein, or responsibility therefor, and that such losses and expenses be stated and apportioned in accordance with the established usage and laws of this Province in similar cases, by Captain Robert Thomas, adjuster of marine losses * * "

The plaintiffs did not succeed in rescuing the vessel, but saved the greater part of the cargo.

The adjuster named in the bond apportioned \$2,314.45 of the \$2,551.98 expended, to the defendants, and \$237.53 to the plaintiffs.

By the statement of defence the defendants set up, *inter alia*, that there was no voluntary sacrifice of anything constituting a claim for general average, but that, on the contrary, the total loss of the vessel happened through stress of weather, and there was no voluntary abandonment of anything for the safety of the rest, and no claim for general average; that the only sum which the plaintiffs were entitled to recover from the defendants was the freight which they were bound to pay to the owners upon the delivery of the coal at the docks of the defendants; that the cargo of coal could have been unloaded by the defendants themselves, and would have been so unloaded but for the interference of the plaintiffs, and the coal delivered on the defendants' docks for the sum of 75 cents per ton, and that \$578.98 was more than sufficient to pay

Statement. for the cost of unloading and delivering the coal ; and while not admitting any liability to the plaintiffs, they brought into Court the sum of \$578.98 in full satisfaction for any claim for freight or otherwise that the plaintiffs might have against the defendants.

The action was tried before BOYD, C., at Toronto, on the 20th May, 1890.

The facts which appeared at the trial are set out in the judgment.

The case was argued at the conclusion of the evidence.

Osler, Q. C., for the plaintiffs. The defendants entered into the average bond and so approved of what was done ; the bond admits that it is a case of general average ; but apart from the bond this is a case of average. The defendants consented to the saving of the vessel and cargo as a whole, and cannot say now that they could have saved the cargo at a cheaper rate. Besides, the defendants had no right to remove the coal if there was the slightest chance of saving the vessel. The average bond is equivalent to a submission to Captain Thomas ; and he having made an adjustment, it is binding on the defendants. I refer to *Birkley v. Presgrave*, 1 East 220 ; Lowndes on General Average, 4th ed., pp. 21, 22, 23 ; McArthur on Marine Insurance, (1885) p. 162 ; *International Wrecking Co. v. Lobb*, 11 O. R. 408.

Delamere, Q. C., (with him *T. Urquhart*,) for the defendants. The bond does not agree that there is any such state of facts as indicates a right to general average. The bond says that whatever is due for general average we will pay. But this is not a case of general average, and nothing is due. After abandonment to the underwriters, no question of general average arises. The freight is gone after abandonment by captain and crew ; the salvage may arise afterwards. I refer to *The "Cito,"* 7 P. D. 5, at p. 8. General average is on the whole venture, but must include freight, cargo, and hull, and if freight is gone, it cannot

attach. The cargo cannot be required to pay a larger sum Argument. than would have been the cost of saving it separately. I refer to Lowndes on General Average, 4th ed., pp. 148, 152, 160, 162; *Kemp v. Halliday*, 6 B. & S. 723, 748. Expensive machinery was brought there only to save the vessel and not the cargo. The plaintiffs had no right to stop the defendants getting out the cargo. The plaintiffs have no rights as salvors. The abandonment here was more than a matter of form. The policy provides that abandonment must involve fifty per cent. loss. I refer to *Gerow v. British America Ass. Co.*, 16 S. C. R. 524. The stranding here was not voluntary, and the cargo is not liable: *Dancey v. Burns*, 31 C. P. 313. Average cannot be allowed unless with a view to carry on the voyage: *Grover v. Bullock*, 5 U. C. R. 297; *Job v. Langton*, 6 E. & B. 779; *Anderson v. Ocean Steamship Co.*, 10 App. Cas. 107; *Svensilen v. Wallace*, 13 Q. B. D. 69; *Royal Mail Steam Packet Co. v. English Bank of Rio de Janeiro*, 19 Q. B. D. 362.

Osler, Q. C., in reply. Abandonment to underwriters is subrogation, and does not make the vessel a derelict. This is a case of the owner trying to bring a ship to her haven, and there is no abandonment by which freight is lost. The expedition was for the purpose of enabling the vessel to complete her voyage. The bond is to be so read as to include certain losses and expenses which it says constitute "general average."

June 4, 1890. BOYD, C. :—

The schooner "Gleniffer," loaded with hard coal, bound to Toronto from Oswego, stranded near Mimico under stress of weather, on 28th November, 1889. Next day the vessel was abandoned as a total loss to the underwriters, the plaintiffs, who had insured her to the extent of \$5,000. Next day the cargo-owners, (the defendants) made arrangements to unload at their own expense, but the plaintiffs refused to allow this to be done. The defendants were informed that the plaintiffs (as subrogated to the rights of

Judgment.

Boyd, C.

the owner) were taking steps to save vessel and cargo, by one expedition, as they thought that this was the more advisable course. The defendants were told they could not get the cargo without signing an average bond—that if they did not sign, the coal would be sold to pay charges. Upon this the bond dated 3rd December was signed. The wrecking expedition brought by the plaintiffs from Port Colborne—after some expensive work and delay from rough weather—failed to rescue the vessel, but saved 578 tons of coal, (net) out of a total shipped of 656 (net). The wrecking expenses exceed the value of the salvage, and upon adjustment some \$2,350 is claimed from the defendants as their contribution.

The price of the coal was \$3.39 a ton (net). The proportional charges now claimed by the plaintiffs average a fraction over \$4 a ton, while the defendants prove that if allowed to remove the cargo, it would have cost them 75 cents a ton to bring from Mimico to their dock. The average bond signed is *ex facie* imperfect, and in my opinion it cannot bind the defendants to pay more than they are rightfully liable to pay in the premises.

The question thus presented does not appear to have been decided. Though American authorities would support the plaintiffs' contention that the whole expense is the subject of general average according to the adjustment herein made; yet the indications of English law are opposed to it.

The principle which governs this branch of law is succinctly put by Hannen, J., in *Walthew v. Mavrojanis*, L. R. 5 Ex. at p. 126: "It is unjust that expenses incurred by the owner of the ship for the benefit of all should be borne by him alone. * * * Only expenses which are incurred in the preservation of ship and cargo from a common danger are included in general average." The words "benefit" and "preservation" in this extract are to be read as equivalent—the paramount point is that the expenditure be for the safety or preservation of ship and cargo from a common danger.

Another step is gained in the solution of this question by reference to the rule suggested by Brett, M. R., in *Svensden v. Wallace*, 13 Q. B. D. 73: "Every expense incurred [*i. e.*, extraordinary expense] for the preservation of ship and cargo comes within general average. Applying this rule in its ordinary sense to each item successively claimed as an item of expenditure in respect of which a general average contribution in any given case is due, the question must be: was this item of expenditure, at the moment it was incurred, incurred for the safety of both ship and cargo?" He then deals with the case of a ship putting into a port of distress for repairs in consequence of damage done by sea perils, and says: "When the ship and cargo are in the port, both may still be in danger of destruction, or the ship alone, or the cargo alone. (1) If both ship and cargo are in danger, it is impossible to conceive, as a fact, that anything which can substantially be called repairs can be done to the ship whilst the cargo is in her. The cargo must then be landed for the safety of both. (2) But the ship alone may be in danger, as for instance, of breaking her back on a falling tide, if the cargo be left in her, though the cargo, from its nature, would not be in danger. In such a case the cargo must be landed solely for the safety of the ship. (3) The cargo alone may be in danger, as if the injured ship be on the ground and safe, but the cargo be perishable if wetted; then the cargo must be landed, but solely for the safety of the cargo. Or, (4) it may be necessary to land the cargo, though neither it nor the ship be in immediate danger, or though the ship only be in danger, because the injury to the ship cannot be repaired without the removal of the cargo." He then says as to the first case, the cost of unloading would be clearly a general average expenditure; but as to the 2nd, 3rd, and 4th, it would not be, treated as if it were the cost of the sole act done. But as to the 4th case put, he observes it has always been treated as if the going into port to repair was one act, and as if that one were the act of sacrifice: p. 77.

Judgment.

Boyd, C.

Judgment.

Boyd, C.

Now applying this method of analysis, I think it appears that the "Gleniffer" and her cargo were not, when stranded, in a common danger, and the expenditure made was not for the preservation or safety of both ship and cargo. The hard coal which she carried would sustain no injury from the water; it was in no danger of being carried away; though the upper timbers of the vessel might be battered and pounded to pieces, the coal below the water line would remain as steady as if in the foundations of a sunken crib. As to the coal above water, it was a comparatively simple and inexpensive process to remove that by lighters; and as a matter of fact it could have been done before stress of weather set in, and during the delay which occurred before the expedition from across the lake could be got to work. The more elaborate preparations of the plaintiffs were for the deliverance of the vessel on which their insurance attached, and the removal of the coal was ancillary to that end: *Schuster v. Fletcher*, 3 Q. B. D. 418. The coal was to be delivered in a particular and expensive way, because that would give the best chance of securing the schooner; the simple way of getting out the cargo was rejected, because it might imperil the vessel. The effort was not to preserve the cargo but to save the vessel.

Now, the plaintiffs, standing in the shoes of the ship-owners, were masters of the situation; they could prohibit the interference with the coal by the defendants whether they claimed for freight or general average till they were paid or secured for their lien. As put by the evidence, the plaintiffs proposed to take the place of the owners to arrange for the unloading of the cargo, and to deliver it at the defendants' docks: *Huth v. Lamport*, 16 Q. B. D. 735. This is the reason why the plaintiffs required the bond to be given; but, as I have intimated, the question still remains what sum is reasonable and proper to be paid, having regard to the relative situations of vessel and cargo. The adjustment made in this case, if erroneous in principle, is no obstacle to the determination of the real liability on

the present record: *Anderson v. Ocean Steamship Co.*, 10 App. Cas. 107, 115. Judgment.
Boyd, C.

I think the last step may now be taken by referring to the judicial opinion expressed by Blackburn, J., in *Kemp v. Halliday*, 6 B. & S. at p. 748: "I do not mean to say that in every case where a ship with cargo on board is submerged, and the two are in fact raised together by one operation, the expenditure incurred must necessarily be for the common preservation of both. I think it is in every case a question of fact whether it was so; and if the cargo could be easily and cheaply taken out of the ship and saved by itself, it would not be proper to charge it with any portion of the joint operation which in that case would not be incurred for the preservation of the cargo."

Lowndes on General Average lays down as a proposition based upon the above citation, that when a ship with her cargo on board has been sunk, [or stranded] if the cargo can be more easily and cheaply saved by itself than conjointly with the ship, the cargo cannot be required to pay, as its share of contribution towards a conjoint salvage, a larger sum than would have been the cost of saving it separately: pp. 161-2. And in an author, much commended for accuracy, it is said in discussing the expense of saving the ship and cargo after stranding, that expenses incurred in saving both ship and cargo together, as by raising a ship that has sunk, or dragging her off a bank while still loaded, are general average expenses; with the limitation, however, that the burden thus thrown on the cargo must not be greater than the cost of saving it by itself: Carver on Carriage at Sea, sec. 397. And in the next paragraph, he says, on the same line: "If the ship and cargo can be saved by a connected set of operations, though in separate parts, it seems that the expense of the whole operations should be treated as a general average expenditure, unless that would impose a greater burden on the cargo than the cost of saving it alone."

The defendants have paid \$578.75 into Court. I think

Judgment. they are liable only to pay what they would have paid to recover the cargo by their own exertions ; if the parties disagree, they may have a reference, of which the costs will be reserved ; but costs up to judgment to the defendants. If no reference is asked, judgment will be for the defendants with costs.

[QUEEN'S BENCH DIVISION.]

McCRANEY ET AL. V. MCCOOL ET AL.

Partnership—Dissolution—Pending contract,

The defendants contracted to deliver lumber to a firm of three partners. Before delivery the firm was dissolved, and the defendants refused to carry out their contract.

In an action brought in the individual names of the three partners, for damages for non-delivery :—

Held, that the dissolution of the firm was no justification in law for the defendants' refusal to carry out their contract.

Statement.

THIS action was brought by William McCraney, T. S. McCool, and Robert S. Wilson, against James McCool & Co. The plaintiffs based their claim upon the following written memorandum :

TORONTO, Jan. 7th, 1889.

Memorandum of agreement between James McCool & Co., of Mattawa, and McCraney, McCool, & Wilson, Toronto.

We hereby agree to supply the enclosed bills of red pine to McCraney, McCool, & Wilson, for eleven dollars per thousand, f. o. b. cars at Mattawa. To be good, sound, common, free from black knots, properly manufactured, and square edged, and free from bad shakes ; bill No. 1 to be cut and delivered on cars by June 10, 1889 ; and bill No. 2 by July 10, 1889. If not filled in time or according to specifications, we will stand any loss that McCraney, McCool, & Wilson are put to in getting it elsewhere. Terms, three months from date of shipment.

JAMES MCCOOL & Co.

The statement of claim alleged that the plaintiffs were ^{Statement.} entitled to receive from the defendants the lumber agreed to be delivered by the defendants, but that the defendants neglected and refused to deliver it, and by reason thereof the plaintiffs had suffered damage, &c., and they claimed \$500.

The defendants by their statement of defence admitted that they entered into the agreement set out with the firm of McCraney, McCool, & Wilson; but they said that shortly after the 7th January, 1889, and long before the time specified in the agreement for the delivery of the lumber, the firm of McCraney, McCool, & Wilson was dissolved by the retirement therefrom of T. S. McCool, who thereupon withdrew a large portion of the capital of the said firm, and a new firm was formed by the remaining partners under the firm name of McCraney & Wilson; that the defendants immediately upon learning of the dissolution notified the new firm of McCraney & Wilson, by whom they were requested to carry out the contract, that they did not recognize the right of the new firm to enforce performance thereof, and would not supply the lumber on the credit of the new firm.

The action was tried before STREET, J., without a jury, at the Toronto Winter Assizes, 1890.

It appeared that by indenture of dissolution, dated 21st March, 1889, the partnership of McCraney, McCool, & Wilson was dissolved, McCool retiring as and from 1st January, 1889, and the remaining members of the firm assuming the liabilities of the partnership, and agreeing to indemnify McCool. The defendants, having received information of the dissolution, wrote to McCraney & Wilson on the 11th March, 1889, and again on the 16th March, 1889, declining to carry out the contract.

STREET, J., gave judgment for the plaintiff for \$318 with costs.

Argument.

The defendants appealed from his judgment, and their appeal was argued before the Divisional Court (ARMOUR, C. J., and FALCONBRIDGE, J.) on the 21st May, 1890.

M. J. Gorman, for the defendants. The contract was to deliver timber to a particular firm. One of the partners left the firm before delivery, and the vendors had a right to repudiate. The financial position of the firm of purchasers was an element in the contract, and that position being altered, the purchasers are not entitled to call for delivery. I rely especially on *Arkansas Smelting Co. v. Belden*, 127 U. S. 379. I also refer to the following authorities: *Robson v. Drummond*, 2 B. & Ad. 303; *Humble v. Hunter*, 12 Q. B. 310; *Dry v. Davy*, 10 A. & E. 30; *Parsons on Partnership*, 3rd ed., pp. 361, 362; *Story on Partnership*, sec. 249; *Benjamin on Sales*, (Am. Series), sec. 70; *Lansden v. McCarthy*, 45 Mo. 106; *Dickinson v. Calahan*, 19 Pa. St. 227; *Pollock on Contracts*, 5th ed., p. 449.

Fullerton, Q. C., for the plaintiffs. *Lindley on Partnership*, 5th ed., p. 287, shews the legal principles affecting this case. On the strength of that the action was brought in the name of the three individuals who composed the firm with whom the contract was made. The bargain here does not relate to the skill of the persons with whom it was made, and there was therefore no right to repudiate: *British Waggon Co v. Lea*, 5 Q. B. D. 149.

Gorman, in reply, referred to *Boston Ice Co. v. Potter*, 123 Mass. 28.

June 6, 1890. FALCONBRIDGE, J. :—

The defendants refused to carry out the contract, claiming that they were not bound to recognize the right of the new firm to enforce performance of the agreement and to supply the lumber on the credit of the new firm.

The single point in the case is whether they were justified by the fact of McCool's retirement in so refusing. They would still have his liability, which could not be got

rid of by any arrangement of McCraney, McCool, and Wilson, amongst themselves. Is there then any difference between the liability of William McCraney, T. S. McCool, and Robert S. Wilson individually, and that of McCraney, McCool, & Wilson, a firm of wholesale dealers in pine and hardwood lumber, &c., as set forth in the heading of the paper on which the contract is written ?

Judgment.

Falconbridge,
J.

No doubt there is a difference. One might be very willing to give credit to a combination of two or more persons working together in a business when he would not trust the same persons jointly as individuals. The theory of partnership is a refinement of the adage that "union is strength." The implied division of labour and application of each partner's hand or brain to that part of the business for which he is supposed to have a special aptitude would almost necessarily produce greater results than the sum of their divided efforts.

But the further question is whether this affords the defendants a justification in law for refusing to carry out the contract, bearing in mind, as I have said before, that the retiring partner does not get rid of his liability to defendants.

Lord Denman, C. J., says in *Humble v. Hunter*, 12 Q. B. at p. 317: "You have a right to the benefit you contemplate from the character, credit, and substance of the party with whom you contract."

Sir Frederick Pollock (Contracts, 5th ed., p. 453), says: "Again rights arising out of a contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that," &c.

This statement was approved in *Arkansas Smelting Co. v. Belden*, 127 U. S. 379, a case which is strongly relied on by defendants' counsel.

There had been in that case an assignment of the contract to a stranger, and the judgment was that the defendants had a perfect right to decline to assent to this, and to refuse to recognize a party with whom they had never contracted, as entitled to demand future deliveries.

Judgment. That is not this case. Here there is no assignment to a Falconbridge, stranger.

J.

It was held also in that case that the defendants by continuing to deliver ore to one of the partners after the partnership had been dissolved and had sold and assigned to him the contract, were not estopped to deny the validity of a subsequent assignment by him to a stranger; Mr. Justice Gray remarking (p. 388): "The change in a partnership by the coming in or withdrawal of a partner might perhaps be held to be within the contemplation of the parties originally contracting."

The defendants have failed to point to any clear authority in support of their position; and the motion must be dismissed with costs.

ARMOUR, C. J. :—

I do not think that the dissolution of the firm of McCraney, McCool, & Wilson (or rather the threatened dissolution of it, for that firm was not actually dissolved until after the defendants refused to carry out their contract) afforded any legal justification to the defendants for their refusal to carry out their contract.

The only consideration for the contract by the defendants to deliver the pine was the contract of the firm to pay for it, and the defendants lost nothing by the dissolution of the firm, for the firm still continued liable to them, notwithstanding the dissolution, upon its contract to pay for the pine delivered.

The judgment of the learned Judge must therefore be affirmed, and the motion dismissed with costs.

[QUEEN'S BENCH DIVISION.]

GRAHAM ET AL. v. MCKIMM.

Defamation—Libel—Article referring to advertisement published contemporaneously—Fair criticism—Evidence—Plaintiff's case—Production of advertisement—New trial.

The plaintiffs brought a written advertisement to the defendant for the purpose of having it published in his newspaper, but the defendant refused to insert it, and the plaintiffs took it away intimating that it would be immediately published in another newspaper. It was so published; and on the day of its publication an article, written before its publication, appeared in the defendant's newspaper, referring to it as unfit for publication. The plaintiffs sued the defendant for libel. The trial Judge told the jury that if the article was nothing more than a fair criticism of the advertisement, it was not libellous. It was objected that the defendant was not entitled to criticize the advertisement because it had not been published before the article criticizing it:—

Held, that this was not a valid objection.

The trial Judge ruled that the plaintiffs were bound to produce and put in as part of their case the written advertisement referred to by the defendant in the article complained of; and the plaintiffs, though protesting, accepted the ruling and put in the evidence:—

Held, that the ruling was wrong; but that the plaintiffs were not entitled to a new trial, the only injury to the plaintiffs being to let the defendant's counsel have the last word with the jury.

THIS was an action to recover damages for an alleged *Statement*. libel published by the defendant, who was the publisher of a newspaper called "The Rideau Record," at Smith's Falls, the plaintiffs being traders in the same place, and was tried at Perth on 1st April, 1889, before MACMAHON, J., and a jury.

The evidence shewed that the plaintiffs shortly before the 4th October, 1888, had arranged with the defendant for space in his issue of that date for the insertion of an advertisement which they were to hand in to him; and in the issue of his newspaper of the week before that date the defendant had notified his subscribers to look out for the coming advertisement. The draft of the advertisement was produced by the plaintiffs to the defendant; but he refused to publish it because he considered that it contained reflections upon some other of his customers, and that it was not an advertisement which he ought to insert

Statement. for that reason. The plaintiffs thereupon took it to the rival newspaper, in which it appeared on 4th October, 1888. In the issue of the defendant's paper of the same date appeared the article complained of as being libellous, which read as follows :

"Graham & Foster.—Our readers, whom we told last week to watch for Graham & Foster's advertisement in this week's issue, will look in vain for it in "The Record." We had agreed with Mr. Graham for six columns space, but when the matter for it was handed to us we were obliged to decline it as unfit for our advertising columns. It was not advertising goods so much as abusing several other merchants who are our patrons, and in this way lowering and degrading the whole trade as well as the paper in which it might appear. At a considerable loss of revenue, we refused it, but we aim to edit a respectable paper, and no respectable paper would publish such stuff. It is contrary to all business principles, and we very much mistake the temper of the people of this town and vicinity if they are drawn in any very large crowds to the doors of the firm who seek to conduct trade in any such manner."

The plaintiffs in their statement of claim set this out with various innuendos, alleging its meaning to be that as traders and merchants they were unworthy of patronage, and had endeavoured to bribe the defendant to do some disgraceful act for their benefit as traders and merchants; that they as traders and merchants were maliciously endeavouring to injure other traders and merchants; that they conducted their business in a disreputable manner, &c.

The defendant set out the advertisement in his statement of defence, and submitted that the alleged libel was only a fair and reasonable statement of his reason for not publishing the advertisement, and was a reasonable comment thereon. He further submitted that the article complained of did not bear the meaning and sense ascribed to it by the plaintiffs. The learned Judge told the jury that if the

article complained of was nothing more than a fair criticism of the advertisement, then no matter whether it was injudicious or not for the defendant to have published it, it was not libellous, and the defendant was not liable. To this charge objection was taken by counsel for the plaintiffs, who urged that inasmuch as the advertisement had not been published before the article complained of, there was no right of criticism upon it at all; that nothing had been published for defendant to write about. The jury found a verdict for the defendant.

At the Easter Sittings of the Divisional Court of the Common Pleas Division, 1889, the plaintiffs moved to set aside the verdict and for a new trial upon the ground of the misdirection complained of at the trial, and upon other grounds referred to in the judgments.

The motion was transferred to the Divisional Court of the Queen's Bench Division, and was argued before FALCONBRIDGE and STREET, JJ., on 28th May, 1889.

Watson, Q. C., for the plaintiffs, referred to Odgers, 2nd ed., p. 573; *Murphy v. Halpin*, Ir. R. 8 C. L. 127; *Morrison v. Belcher*, 3 F. & F. 614; *Gathercole v. Miall*, 15 M. & W. 319; *Paris v. Levy*, 9 C. B. N. S. 342; *Merivale v. Carson*, 20 Q. B. D. 275; *Campbell v. Spottiswoode*, 3 B. & S. 769.

Walter Read, for the defendants, cited *Hedley v. Barlow*, 4 F. & F. 224; *Morrison v. Harmer*, 3 Bing. N. C. 759.

June 27, 1890. FALCONBRIDGE, J. :—

The first question is whether the learned Judge was right in compelling the plaintiffs to put in evidence the advertisement referred to in the article published by the defendant and complained of in this action.

It is broadly stated by Mr. Odgers (Bl. ed. p. 573), that "If the alleged libel refers to any other document, the defendant is also entitled to have the document read as part of the plaintiff's case," citing the three following cases :

(1) *Weaver v. Lloyd*, 1 C. & P. 296.

Judgment.
Falconbridge, J. There the letter from the defendant to the editor of the "Oxford Herald" was read, and it referred to another account of the beating of the horse in question, which had appeared in that paper. The plaintiff's counsel wished to read the account so referred to from the "Oxford Herald." This was objected to, but Garrow, B., held it to be admissible.

This case is not in point. The question here is not as to the admissibility of the evidence, but the compelling plaintiff to put it in.

(2) *Thomson v. Stephens*, 2 Moo. & Rob. 45.

There the report which the defendant was held entitled to have read as part of the plaintiff's case was both referred to in the libel and contained in another column of the same newspaper—not as here, a separate and distinct document.

(3) So too in *Hedley v. Barlow*, 4 F. & F. 224, the decision was that the whole of the publication containing the libel should be put in as the plaintiff's evidence.

It would thus appear that the learned author has stated the rule somewhat more broadly than the cases justify. So that, however attractive his proposition may at first sight be, I cannot find that it is law.

But for the reasons which will be set forth by my brother Street, I am of the opinion that if the learned trial Judge erred in this respect, the error is not ground for a new trial.

As to the second branch of the case: The advertisement referred to in the article had certainly, by being shewn to McKimm and offered to him for publication, been published, although, perhaps, not published to the extent and in the sense of making it a matter of public interest and concern, and therefore a matter of fair criticism. The plaintiff will not swear that he did not in the defendant's presence tell a boy to take it over to the other newspaper, and the fair inference from the evidence is that the defendant knew or had good reason to believe that it was going to appear in the "News" the same day that the article

complained of appeared in the defendant's newspaper. Judgment.
 Assuming the defendant's article to be what the jury have Falconbridge,
 found it to be, a fair criticism on the plaintiffs' advertise- J.
 ment, had not the defendant a right to place it before the
 public on the same day? If the plaintiffs' advertisement
 had not that day appeared, there would have been no
 justification for the defendant; but had he not a right to
 take his chance of its appearing?

Take the case of what is known by a recent and inelegant importation into our language as the political "roorback," by which I understand is meant the publication, perhaps on the very morning of the polling—at any rate too late for contradiction before the close of the election—of statements gravely affecting a party or a candidate. And suppose that party or that candidate to have secret information of the probable appearance and circulation of the "roorback," would they or he not be justified in issuing a vigorous reply within the recognized rules, in such time that both publications should go forth simultaneously, and the electors have the "bane and antidote" both before them at the same time? If the information should prove false, and the "roorback" should never appear, then let him who published the answer be mulct in damages.

In my opinion, the motion should be dismissed with costs.

STREET, J.—(after setting out the facts as above):—

The objection to the charge of the learned Judge at the trial was that at the time the article complained of was written the plaintiffs' advertisement had not become public property by having been published, and that the defendant was therefore not entitled to criticise it. I confess to having been strongly impressed upon the argument with this view of the matter, but further consideration has induced me to adopt as correct the view taken by my brother Falconbridge in his judgment. It is true that the advertisement commented upon had not been published

Judgment.

Street, J.

at the time the article complained of was written, and that it is not identified in the article complained of as the article which appeared in the rival newspaper on the same day; but the identity of the advertisement actually published with that to which the comments related was not in fact disputed, and the defendant appears to have had ample reason for believing that it would appear in the other newspaper contemporaneously with his own article.

It is not different in principle from a criticism upon a book the advance sheets of which had been shewn to the critic with the information that the book was to be immediately published: if, in such a case, the criticism and the book had appeared simultaneously the author could hardly complain that the critic had not waited until the following day before publishing his remarks.

The objection taken at the trial that the defendant's remarks were not in reference to a matter which had become public, is seen to be lacking in substance when it is borne in mind that the advertisement commented upon was brought by the plaintiffs to the defendant for the express purpose of having it made as widely known as possible, and that it was taken away with an intimation that it would immediately be made public in the rival newspaper.

The learned Judge at the trial ruled that the plaintiffs were bound to produce and put in as part of their case the written advertisement referred to by the defendant in the article complained of: the plaintiffs contend that this ruling was erroneous and that a new trial should be granted upon this ground. The ruling was no doubt based upon the broad statement at p. 573 of the Blackstone edition of Odgers on Libel and Slander, that "if the alleged libel refers to any other document, the defendant is also entitled to have the document read as part of the plaintiff's case."

My brother Falconbridge shews in his judgment that the cases cited in support of this proposition do not sustain it to its full extent. It seems to be clear that the

whole of an article relied on as being libellous must be put in by a plaintiff and that he cannot select portions of it and require the remainder to be put in by the defendant, if the defendant desires it referred to. Again if a newspaper be put in containing the article complained of, the defendant is entitled to have read as part of the plaintiff's case any other article in the same newspaper referred to in the article complained of: *Darby v. Ouseley*, 1 H. & N. 1. Again, if the plaintiff's case is that a book or publication of his has been unfairly criticised, he must put in the book as part of his case in order to make it out, for he cannot shew that the criticism is unfair without producing the book: *Strauss v Francis*, 4 F. & F. 939.

Judgment.

Street, J.

In the present case, however, the case of the plaintiffs as stated in their pleadings and opened to the jury was that the article published by the defendant was simply a libel upon them; it was for the defendant if he desired to do so to justify its publication by shewing the circumstances and putting in the advertisement to shew that his comments upon it were not unfair. I think, therefore, that the learned Judge was wrong in ruling that the plaintiffs were bound to put in the advertisement as part of their case. The plaintiffs might have refused to do so, and if they had been non-suited might afterwards have raised the question; instead of doing so, they acted upon the ruling and put in the advertisement, though not without more than one protest against being required to do so. The result of this was to give the defendant's counsel the last address to the jury. The question is whether the plaintiffs are entitled to a new trial upon this ground, and I am of opinion that they are not. The established rule is that an erroneous ruling as to the right to begin or to reply is not a sufficient ground for a new trial, unless it is manifest that the ruling has done clear and manifest wrong; *Brandford v. Freeman*, 5 Ex. 734; *Geach v. Ingall*, 14 M. & W. 95.

The evidence here has been laid before the jury by the plaintiffs instead of by the defendant; the result has been that the plaintiffs' counsel was probably deprived of the

Judgment. right to answer the arguments of the defendant's counsel
 Street, J. before the jury; but after carefully looking at the evidence given, I find it impossible to say that I think wrong has been done by the verdict. I agree that the motion should be dismissed with costs.

[CHANCERY DIVISION.]

MACKLEM V. MACKLEM ET AL.

Will—Devise—Forfeiture—Actual possession and occupation—Possession by servant, caretaker, or worker on shares.

S. M. had become entitled under T. C. S.'s will to certain property called "Clarke Hill," of which T. C. S. was owner when he died, and also to an undivided interest in certain other property of which T. C. S. was tenant in common. He also became entitled to a legacy under the following clause of A. H. S.'s will: "I will and direct that so soon as S. M. * * can and does take actual possession of the real estate and property * * under the will of T. C. S. * * my executors * shall * * so long as he remains the owner and actual occupant of the said real estate pay over to him * * * the annual sum of \$2,000 to enable, &c." :—

Held, that this clause, read in connection with the will of T. C. S., referred only to the land of which T. C. S. was absolute owner, and not to the land he owned as tenant in common :—

Held, also, that actual possession and occupation of the land by S. M. was consonant with and satisfied by the possession of a servant or caretaker, or even a worker on shares, and that S. M.'s temporary absence from the mansion house on the property, which was kept furnished and in charge of a servant, did not create a forfeiture.

Statement. THIS was an action for the construction of a clause in the will of Abigail Hyde Street, in these words :

"I will and direct that so soon as Sutherland Macklem, the son of my daughter Caroline, can and does take actual possession of the real estate and property which, under certain conditions expressed in the will of my late son Thomas Clarke Street, he will or may take and enjoy : that thereupon my executors hereinafter named shall, during the lifetime of the said Sutherland Macklem, and so long as he remains the owner and actual occupant of the said real

estate, pay over to him annually in each and every year ^{Statement.} the annual sum of two thousand dollars, to enable him the better to keep up, decorate, and beautify the property known as 'Clarke Hill,' and the islands connected therewith."

Sutherland Macklem was devisee under Thomas Clarke Street's will of "Clarke Hill" and other properties of which Thomas Clarke Street was absolute owner, and he was also devisee of certain shares in other properties in which Thomas Clarke Street was tenant in common merely.

The action was tried at the Sittings held in Toronto on April 28 and May 8th, 1890, before BOYD, C.

It appeared at the trial that the properties in which Thomas Clarke Street was tenant in common had, after his death, been partitioned by proceedings in *Fuller v. Macklem*, 25 Gr. 455, and that Sutherland Macklem had sold and transferred parts of what had been vested in him as his share.

It also appeared that Sutherland Macklem had occupied "Clarke Hill" as a residence for some years, and had then gone to reside with his family temporarily in England for the purpose of studying in order to qualify himself for taking Holy Orders in the Church of England, and that while so absent for the space of three years, he had left "Clarke Hill" furnished, in the charge of a servant, and had farmed on shares a part of the property devised to him absolutely under the will of Thomas Clarke Street with one Oldfield.

F. E. Hodgins, for the executor plaintiff, submitted the case.

Moss, Q.C., and *Bicknell*, for Mrs. Fuller, (one of a class entitled if the legacy to Sutherland Macklem became forfeited) and her assignee. The annuity is forfeited. Sutherland Macklem should not have sold any part, and he must remain in *actual* possession and occupation. Inquiry should be

Argument.

made each year before payment is made if he is the owner and occupant : *Haydon v. Crawford*, 3 O. S. 583 ; *Maclaren v. Stainton*, 27 L. J. Ch. 442 ; 4 Jur. N. S. 199. The evidence shews "Clarke Hill" is not kept up in the same way as if Sutherland Macklem resided there. In *re Moir*, *Warner v. Moir*, 25 Ch. D. 605 ; *Dunne v. Dunne*, 3 Sm. & G. 22, at p. 27 ; 7 D. M. & G. 207 ; *Walcot v. Botfield*, Kay 534 ; 18 Jur. 570 ; *Conway v. Canadian Pacific R. W. Co.*, 7 O. R. 673 ; 12 A. R. 708 ; *Davis v. Canadian Pacific R. W. Co.*, 12 A. R. 724. The annuity is by conditional limitation, and the onus of proof is on the annuitant. A breach for one year ends the annuity altogether : *Moulton v. Robinson*, 27 N. H. (7 Foster) 550 ; *Sharwood & Budd*, L. C. 227 ; Thompson on Homesteads and Exemptions, sec. 263 ; *Lawrence v. Fulton*, 19 Cal. 684.

Robinson, Q. C., for Sutherland Macklem. Power to sell any of the estate except "Clarke Hill" was given to the trustees by T. C. Street's will. Actual possession is that which goes with the title. Possession and occupation under Mr. Street's will are synonymous. Sutherland Macklem was to remain owner of the seven-tenths share of the real estate of which T. C. Street was tenant in common. He could not control its being partitioned or sold. It was partitioned by the Court. He holds what he got under a different title from "Clarke Hill," namely through the partition proceedings. I refer to *Meyrick v. Laws*, 9 Ch. 237 ; *Laplante v. Scamen*, 8 A. R. 557 ; *Fillingham v. Bromley*, T. & R. 530 ; *Ridgway v. Woodhouse*, 7 Beav. 437 ; Abbott's Law of Descent, p. 198 ; *Walters v. The People*, 18 Ill. at p. 199, S. C. 21 Ill. 178 ; *Bank of Toronto v. Fanning*, 17 Gr. at p. 516 ; *Allan v. Fisher*, 13 C. P. at p. 71 ; *Mannox v. Greener*, L. R. 14 Eq. 456 ; *Clavering v. Ellison*, 7 H. L. C. 707 ; *Schnell v. Tyrrell*, 7 Sim. 86.

Hodgins, for the plaintiff, referred to *Hamilton v. McKellar*, 26 Gr. 110 ; *Walmsley v. Gerard*, 29 Beav. 321.

Bicknell, appeared for D. C. Plumb, executor of J. B. Plumb.

O. R. Macklem, for Mrs. Becher and the executor of Mrs. Argument.
Julia A. Macklem.

Moss, Q. C., in reply.

June 4, 1890. BOYD, C.:—

The 26th paragraph of the will of Mrs. Street, read in connection with the will of her son therein referred to, has its appropriate meaning in my opinion by limiting it to land of which T. C. Street was absolute owner.

T. C. Street's will deals with lands of different quality ; about 100 acres including the Clarke Hill estate or property were vested in him as sole owner. He had also a joint undivided interest in about 700 acres of farm land, in which his estate was that of a tenant in common. As to this interest he speaks of it as the "shares" or "share" held jointly with his father's estate which (in the event that happened) were with the accumulations thereof to be made over and assigned to Sutherland Macklem on his attaining the age of twenty-three years. As to the other absolute estate the provision is that he shall not take possession or have charge of the same till he attains that age. This construction is supported by the judicial opinion of Spragge, C., in *Fuller v. Macklem*, 25 Gr. at p. 457.

The 26th paragraph speaks of land which Sutherland Macklem will or may take and enjoy under conditions expressed in the will of T. C. Street. That is satisfied strictly by reading it in connection with the 100 acres above mentioned. As to the land held in common that was dealt with in proceedings for partition, the effect of which was to vest the share of Sutherland Macklem in him directly by virtue of these proceedings, and not under the will of T. C. Street. Under that will Sutherland Macklem took nothing in severalty, and the part which he in particular was to take and enjoy was not ascertained till the vesting order clothed him with sole and distinct ownership of the portion allotted to him. He thus takes both and enjoys an estate of different quality from that

Judgment.

Boyd, C.

which he would have under the will of the original co-owner, T. C. Street: *Clark v. Clayton*, 2 Giff. at p. 336.

Of the 100 acres above mentioned some 14 acres are worked on shares by one Oldfield, and the produce divided between him and Sutherland Macklem. This arrangement is made without lease, merely for the season, and there is no visible occupation of this piece by one more than the other. All the rest of the property is entirely in the hands of Sutherland Macklem.

Assuming that the language of the will as to the land forbids actual occupation by a tenant, I do not hold that the *métayer* arrangement with Oldfield is a breach. The case cited of *Haydon v. Crawford*, 3 O. S. 583, does not apply, for there a lease for four years was one of the chief factors. More like the present case is *Oberlin v. McGregor*, 26 C. P. 460, where an agreement to work on shares without exclusive possession was held not to amount to a tenancy.

The words "possession" and "occupation" used in the will may be regarded as practically synonymous. Each is qualified by the epithet "actual" which does not mean "personal," but may perhaps require something demonstrable to satisfy it, *i.e.*, some possession or user of the land in fact, as distinguished from constructive enjoyment. But such possession or occupation as to the land is consonant with and satisfied by the presence of a servant or caretaker, or even a worker on shares. Occupation may be by either class and yet the possession must be considered that of the legal owner.

As to the Mansion House at Clarke Hill (guided in part by the light reflected from the will of T. C. Street,) I should understand Mrs. Street's will as excluding occupation by a tenant, but not repugnant to temporary absences of the owner, the premises meanwhile being in charge of a caretaker and the rooms remaining furnished against his return. Such is the condition of this property, and upon the circumstances in evidence I judge that no forfeiture as to the \$2,000 has occurred. Among the many cases I have consulted perhaps the most pertinent are: *Smith v. The*

Overseers of Seghill, L. R. 10 Q. B. 422; *The King v. The Inhabitants of Aberystwith*, 10 East at p. 357; *Mannox v. Greener*, L. R. 14 Eq. 456; *Bushby v. Dixon*, 3 B. & C. at p. 307, per Littledale, J.; and *Lyell v. Kennedy*, 14 App. Cas. at pp. 456, 7, per Earl of Selborne; *The Guardians of the Callan Union v. Armstrong*, 16 L. R. Ir. 35 (1885); and *Rabbeth v. Squire*, 19 Beav. 70, affirmed 4 D. & J. 406.

Judgment.
Boyd, C.

Costs will come out of the estate.

G. A. B.

[QUEEN'S BENCH DIVISION.]

RE LONG POINT COMPANY V. ANDERSON.

Game—Fera natura—Property of owner of land in deer found thereon—29 & 30 Vic. ch. 122—R. S. O. ch. 221, sec. 10—Construction of—Prohibition—Division Court—Undisputed facts—Error in law—Misconstruction of statutes.

The defendant killed upon his own land, which adjoined that of the plaintiffs and was unfenced, a deer, one of the progeny of certain deer imported by the plaintiffs and defendant, and allowed to run at large upon the land :—

Held, that the deer was *fera natura* and, having been shot by the defendant upon his own land, belonged to him :—

Held, also, that neither the Act incorporating the plaintiffs, 29 & 30 Vic. ch. 122, nor R.S.O. ch. 221, sec. 10, vested the absolute property in the deer in the plaintiffs.

Prohibition was granted to a Division Court where there were no facts in dispute and the Judge in the inferior Court applied a wrong rule of law to the facts and grounded his judgment upon a misconstruction of the Acts above referred to.

MOTION by the defendant for a prohibition to the 5th Division Court of the county of Norfolk, after judgment for the plaintiffs for \$15 damages for killing a deer, on the ground that the right or title to a corporeal or incorporeal hereditament was in question : R. S. O. ch. 51, sec. 69, (4). Statement.

The plaintiffs were incorporated by 29 & 30 Vic. ch. 122, and were thereby authorized to carry on the business of "pursuing, protecting, and granting licenses to take game, muskrats, mink, otter, beaver, and fish," upon their lands

Statement. and property to be acquired by them on Long Point, in Lake Erie.

The island of Long Point in Lake Erie is about thirty miles long, and of varying width. One end is separated from the mainland by a narrow channel, and the other end stretches far out into the lake. It contains upwards of 20,000 acres; and in 1874 it was all owned by the plaintiffs except two parcels of about 200 acres each, owned by government, one parcel at each extremity of the island, and except another parcel of 360 acres, which was owned as tenants in common by the plaintiffs and the defendant, the plaintiffs owning three, and the defendant one, undivided share, in fee simple. There were not at that time, nor since, any fences separating the parcels of the several owners, as above mentioned, from each other.

Under the circumstances above stated, the plaintiffs in 1874 imported fifteen deer, and placed them upon their own land upon the island, with the desire to breed and preserve them. They were turned loose and allowed to run at large, and there were then no other deer upon the island. In the year 1881 the defendant Anderson placed four deer, some of each sex, upon his lands; that is, upon the 360 acres, which were then owned by the plaintiffs and himself as tenants in common; and he did this knowing of the deer which had been placed on the island by the plaintiffs in 1874. In the year 1885 the 360 acres owned in common were partitioned between the plaintiffs and the defendant, and the plaintiffs from that time owned 270 acres, and the defendant ninety acres thereof in severalty.

The deer had greatly increased in numbers, and they roamed at large over the whole island. The defendant killed the deer upon his own land, and upon these facts which were all admitted by the parties upon the trial before the learned Judge of the County Court, he gave judgment for the plaintiffs for \$15.

The motion for prohibition was argued before MAC-Argument. LENNAN, J. A., sitting for GALT, C. J., in Chambers, on the 5th April, 1890.

C. E. Barber, for the defendant.

W. M. Douglas, for the plaintiffs.

April 14, 1890. MACLENNAN, J. A. (after stating the facts as above):—

The plaintiffs relied on R. S. O. ch. 221, sec. 10. I think the prohibition must be refused.

The nature and history of the respective titles of the parties to their respective lands are, in my opinion, very important in their bearing upon the proper judgment to be given in the action, but these titles are not in question. They are admitted on the one side and on the other. There is no dispute about the right or title to the land, or any interest therein, and the sole question is whether the killing of the deer by the defendant on his own land was under the circumstances a wrong for which the plaintiffs have a legal right to complain, and to recover damages from the defendant.

I have no right to express an opinion upon the merits, and I express none, although the merits were pretty fully discussed before me; but I am unable to see that this is an action in which, as expressed by the statute, the right or title to any corporeal or incorporeal hereditament comes in question.

The motion must be refused with costs.

The defendant appealed from this decision, and his appeal was argued before the Divisional Court (ARMOUR, C. J., and FALCONBRIDGE, J.,) on the 19th May, 1890.

C. E. Barber, for the defendant. The title to the defendant's land comes in question. The deer of the plaintiffs are *feræ naturæ*, and the defendant had the right to shoot all such when found upon his own land. An action for the value of the deer shot is in effect an action for the land. The effect of the decision is to oust the defendant's title to his own land. Under these circumstances prohibi-

Argument.

tion will be granted. I refer to *Portman v. Patterson*, 21 U. C. R. 237; *Trainor v. Holcombe*, 7 U. C. R. 548; *Tinniswood v. Pattison*, 3 C. B. 243; *Chew v. Holroyd*, 8 Ex. 249. The statutes cannot be construed so as to vest the absolute property in the plaintiffs. I refer to the following authorities upon the construction of statutes: *East London R. W. Co. v. Whitechurch*, L. R. 7 H. L. 81; *Attorney-General v. Kwok-a-Sing*, L. R. 5 P. C. 197; *Regina v. Bachelor*, 15 O. R. 641; *Tennant v. Howatson*, 13 App. Cas. 489, 496.

W. M. Douglas, for the plaintiffs. No corporeal or incorporeal hereditament comes in question. The plaintiffs rely on R. S. O. ch. 221, sec. 10. The questions arising in the action relate to *animus revertendi* and confusion of property. This was a clear case of confusion of property, and the onus was on the defendant to separate. I refer to *Lawrie v. Rathbun*, 38 U. C. R. 255. These were questions of fact for the Court below, and prohibition will not lie: *Re Knight v. Medora*, 14 A. R. 112; *Siddall v. Gibson*, 17 U. C. R. 98. The deer are the absolute property of the plaintiffs as long as they remain in confinement, and even if they stray away, so long as they have the *animus revertendi*, they remain the plaintiffs' property: Kent's Commentaries, (Bl. ed.) vol. 2, p. 365; Kerr's Blackstone, vol. 2, pp. 365, 406.

Barber, in reply. The general law applicable to game will be found in Burn's Justice, 30th ed., vol. 2. pp. 742 *et seq.*; Stephen's Commentaries, vol. 1, pp. 160, 169; vol. 2, pp. 4, 7, 8; Williams on Personal Property, p. 28; Co. Lit. p. 8, note A.; *Ford v. Tynte*, 2 J. & H. 150; *Morgan v. Abergavenny*, 8 C. B. 768.

June 27, 1890. The judgment of the Court was delivered by

ARMOUR, C. J. :—

There is no doubt that the deer for which the defendant was sued was *feræ naturæ*, and having been shot by the

defendant upon his own land belonged to him : *Blades v. Higgs*, 12 C. B. N. S. 501 ; *S. C.*, 11 H. L. C. 621 ; *Lonsdale v. Rigg*, 11 Ex. 654 ; *S. C.*, 1 H. & N. 923 ; *Morgan v. Abergavenny*, 8 C. B. 768. Judgment.
Armour, C. J.

It is equally clear that neither the Act 29 & 30 Vic. ch. 122, nor the Act R. S. O. ch. 221, sec. 10, vested the absolute property in the deer in question in the plaintiffs. The first mentioned Act permitted the plaintiffs to carry on the business of pursuing, protecting, and granting licenses to take game, muskrat, mink, otter, beaver, and fish upon their lands and property, or in the waters covering the same ; and the Act secondly above mentioned provided that, in order to encourage persons who had theretofore imported or might thereafter import different kinds of game with the desire to breed and preserve the same on their own lands, it should not be lawful to hunt, shoot, kill, or destroy any such game without the consent of the owner of the property wherever the same may be bred.

The word "property" here used clearly signifies lands.

The Legislature plainly avoided in these Acts dealing with the property in the game referred to therein, and these Acts do not at all affect the common law right of the owner of the land to kill and take any such game as may from time to time be found on his land ; and as soon as he takes and kills such game so found on his land, it becomes his absolute property.

It is his *ratione soli*, and as laid down in *Blades v. Higgs*, "property *ratione soli* is the common law right which every owner of land has to kill and take all such animals *feræ naturæ* as may from time to time be found on his land, and as soon as this right is exercised the animal so killed or caught becomes the absolute property of the owner of the soil ;" and this property *ratione soli* the Legislature has not by their Acts attempted to interfere with.

The judgment of the learned Judge is plainly errone-

Judgment. ous, but the question is whether under the circumstances Armour, C.J. prohibition will lie.*

It may be doubtful, but upon this I express no opinion, whether *certiorari* could have been brought, the damages claimed not amounting to \$40: R. S. O. ch. 51, sec. 79; but failing *certiorari* the defendant could have no remedy

*The Judge of the County Court of Simcoe gave a written judgment, in which he said *inter alia*: There was some discussion as to who was meant by "the owner of the property" (in R. S. O. ch. 221, sec. 10); whether "property" meant the animals or the lands upon which they were being bred and preserved; but in either view it would be the plaintiffs whose permission would have to be obtained, and, in the absence of such permission, it does not seem to be any answer to say that when the animals were killed they were not on the plaintiffs' lands.

It was urged that defendant Anderson had such an interest in the deer upon this island as would justify him in shooting them upon his own land, and authorizing the other defendants to do likewise. This claim is based upon the admitted fact that after the plaintiffs had put a number of deer upon that part of the island of which they were solely seized, the defendant Anderson put others upon another part which he then held as a tenant in common with the plaintiffs.

There was nothing done by him to prevent his deer from mingling with those of the plaintiffs, and no means were or probably could be adopted whereby the former could be distinguished from the latter; the result is that they have intermingled, and now form one herd. It is as complete a case of confusion of property as if he had cast gold into the plaintiffs' crucible; and where such confusion as in this case has been wilful, the rule seems to be that he who creates the confusion forfeits his property which he has wilfully mixed with that of another.

It was also contended for the defendant that the franchise of the plaintiffs being in question in these actions, the jurisdiction of this Court is ousted, and further, that the result of a judgment in the plaintiffs' favour would be to call in question the defendant Anderson's right to shoot game upon his own land, which it is claimed is an incorporeal hereditament appurtenant thereto, and therefore this Court has no jurisdiction.

With regard to the first of these objections, the plaintiffs' franchise is contained in a public Act of Parliament, which I am bound to notice, there was no dispute as to the validity of this Act, and I am unable to see that in any way the franchise came in question.

As to the second objection, I have not had occasion to consider whether the defendant Anderson has or has not a right to shoot game upon his own land; but I have come to the conclusion that the statute to which reference has been made had the effect of protecting the deer in question from being treated as ordinary game, and prohibited all persons alike from shooting them without the leave of the plaintiffs.

except prohibition, and if prohibition will not lie he will be without remedy.

Judgment.
Armour, C.J

I have come to the conclusion that prohibition will lie because there were no facts in dispute, all the facts being admitted upon which the learned Judge had to determine the case, and adopting the words of Blackburn, J., in *Elston v. Rose*, L. R. 4 Q. B. 4: "I think he was wrong in the conclusion at which he arrived, because he applied a wrong rule of law to the facts, and therefore that he had no jurisdiction."

And also because the learned Judge grounded his judgment upon a misconstruction of the Acts above referred to.

In *The Queen v. The Judge of the County Court of Lincolnshire*, 20 Q. B. D. 167, Pollock, B., said: "In many of the older cases it has been held that where a Judge of an inferior Court purported to give himself jurisdiction by misconstruing an Act of Parliament, the superior Court would interfere by prohibition. That is not this case, but this case depends on the same principle, for here the County Court Judge came to the conclusion on the construction of the will that the words of that will gave him jurisdiction to make this order not only as against the defendant in this action but also as against the trustees. It was contended by Mr. Chester that if it is once shewn that there was jurisdiction, and then a document is construed wrongly, and in consequence of so construing it the Judge exceeds his jurisdiction, the High Court cannot interfere by prohibition. I am of opinion that this contention is wholly untenable. * * More shortly stated the principle is this: a Judge cannot give himself jurisdiction by construing an Act of Parliament or a document wrongly."

See also judgment of Rose, J., in *Re Macfie v. Hutchinson*, 12 P. R. 167.

The judgment appealed from will therefore be reversed, and the order for prohibition will go, with costs here and in Chambers to be paid by the plaintiffs to the defendant.

[QUEEN'S BENCH DIVISION.]

PECK V. AGRICULTURAL INSURANCE COMPANY.

Insurance, Fire—Unoccupied building—Special condition—Reasonableness—Information given to agent of insurance company, but not in application—Powers of agent—Evidence—Rejection of.

The defendants issued a policy of insurance against fire dated 23rd April, 1889, upon a house of the plaintiff.

The application signed by the plaintiff stated that the house was occupied as a residence by the plaintiff's son. A fire took place on the 14th November, 1889, at which date and for six months previously the house had been unoccupied. One of the special conditions indorsed upon the policy was that if a building became vacant or unoccupied and so remained for ten days, the entire policy should be void. The plaintiff and his wife swore that when the agent came to him and drew the application he asked the plaintiff if there was anyone in the house at the time, and the plaintiff told him that his son was living there at the time, but was going to leave in about two weeks, and asked if that would make any difference, and was informed by the agent that it would not. By a clause in the application the plaintiff agreed that no statement made or information given by him prior to issuing the policy to any agent of the defendants should be deemed to be made to or binding upon the defendants unless reduced to writing and incorporated in the application; and on the margin of the application there was a notice shewing that the powers of agents were limited to receiving proposals, collecting premiums, and giving the consent of the defendants to assignments of policies:—

Held, that the special condition referred to was not an unreasonable one, and that the agent had no power to vary it; and an action to recover the amount of the loss was dismissed.

The plaintiff at the trial sought to give evidence of certain transactions between the agent of the defendants and a brother of the plaintiff, for the purpose of shewing that the plaintiff, having become aware of them before the application made by him, was justified in believing that the defendants did not regard the condition as to occupation as a material one:—

Held, that this evidence was properly rejected.

Statement.

THIS action was brought by the plaintiffs upon an insurance policy of the defendants insuring a barn and dwelling-house and their contents against fire. The defences relied upon were: 1st, that the dwelling-house was insured as being occupied, and that having become unoccupied during the period of the insurance, the policy became void by reason of one of the special conditions indorsed upon it; and 2nd, that the proofs of loss had not been made within the time fixed for that purpose by a special condition on the policy. The reply to these

defences was that the special conditions were unreasonable, and that if reasonable, they had been waived; and as to the second one, that it would be inequitable to allow it to have effect. The policy was made on 23rd April, 1889, upon an application signed by the insured, dated 21st April, 1889, in which it was stated that the house was occupied as a residence by the son of the insured. A clause in the application immediately over the signature of the applicant stated that "it is expressly agreed upon the part of the applicant that no statement made or information given by him prior to issuing the policy of insurance based upon this application, to any agent or solicitor of the company, shall be deemed to be made to or binding upon this company unless the same is reduced to writing and incorporated in this application;" and in the margin of the application a notice was given in the following words: "The powers of the agents of this company are limited to receiving proposals for insurance and collecting premiums and giving the consent of the company to assignments of policies."

The material portions of the special conditions indorsed upon the policy were the following:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * if a building herein described, whether intended for occupancy by owners or tenant, be or become vacant or unoccupied, and so remain for ten days. In any matter relating to this insurance no person unless duly authorized in writing shall be deemed the agent of this company.

"This policy shall be cancelled at any time at the request of the insured, or by the company by giving notice of such cancellation. If this policy shall be cancelled or become void, or cease as hereinbefore provided, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy, this company retaining the customary short rate; except that when this policy is cancelled by this company by giving notice, it shall retain only the *pro rata* premium.

Statement.

"If fire occur, the insured * * within forty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire, * * the interest of the insured and of all others in the property, the cash value of each item thereof, and the amount of loss thereon, * * by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of the fire; and also the certificate of a magistrate or notary public living nearest the place of fire, &c.

"This company shall not be held to have waived any provision or condition of this policy or any forfeiture thereof by any requirement, act, or proceeding on its part relating to the appraisal or to any examination herein provided for.

"No suit or action on this policy for the recovery of any claim shall be sustainable in any Court of law or equity, until after full compliance by the insured with all the foregoing requirements.

"No agent is permitted to waive any stipulation or condition contained" in the policy.

At the trial at Belleville, before ARMOUR, C. J., and a jury, the plaintiff swore that when the agent came to him and drew the application, he asked the plaintiff if there was any one in the house at the time, and that the plaintiff told him that his son was living there at the time, but was going to leave in about two weeks, and asked if that would make any difference, and was informed by the agent that it would not. This evidence was corroborated by that of the plaintiff's wife.

The fire took place on the 14th November, 1889. At that time, and for some six months previously, the dwelling-house had been unoccupied. The origin of the fire appeared to be unknown. The plaintiff stated that he went over the day after the fire to see the local agent, and that he came down a few days afterwards and told the plaintiff

that he might have his pay in a few days, but that the Statement.
company had the right to keep it for sixty days; that a few days after the fire, the agent told him he had written to Mr. Clarke, the inspector of the company, and finally that he had written to Mr. Flynn, the general agent for Canada. Nothing was done towards putting in claim papers until early in January, and they were not as a fact put in until 14th January, 1890. When put in, they stated that the dwelling-house was used by the applicant for storing apples, &c., at the time of the fire. On the 15th January, 1890, Mr. Flynn wrote to the inspector asking him to point out to the applicant that in his proof he had omitted to give the exact time since a family lived in or left the dwelling, and saying that upon receiving this information, he would lay the matter before the head office. On the 24th January, 1890, he wrote the plaintiff declining to pay, because the proofs of loss had not been put in within the time required by the conditions.

Upon these facts the learned Chief Justice entered a nonsuit, being of opinion that the plaintiff was debarred from recovering by reason of the conditions of the policy as to occupation; and also because it did not appear that anything had been done to satisfy the condition which required the claim to be put in within forty days.

At the Easter Sittings of the Divisional Court the plaintiff moved to set aside the nonsuit and enter judgment for him or for a new trial, upon the ground that the conditions relied upon were unreasonable, and should have been so declared; that the trial Judge had improperly excluded evidence shewing that the defendants by their acts and conduct had led the plaintiff to believe that the fact of the premises being vacant was not regarded as material to the risk by the defendants; that the defects, if any, in the proofs of claim were not open to objection by the defendants; and that sufficient proofs of claim were made by the plaintiff.

Argument.

The motion was argued before the Divisional Court (FALCONBRIDGE and STREET, JJ.,) on 27th May, 1890.

Clute, Q. C., for the plaintiff. The fire was on the 14th November, 1889, and the proof papers were put in on the 14th January, 1890. The case is within R. S. O. ch. 167, sec. 118, which cures the defect. Imperfect compliance has as much relation to time as to form: *May v. Standard Ass. Co.*, 5 A. R. at pp. 619, 620, 621. As to the objection that the premises were not occupied, the agent was asked as to this, and stated that it would make no difference. The agent knew the intention was that the premises should be vacant. I refer to *Parsons v. Queen Ins. Co.*, 2 O. R. 45; *Robins v. Victoria Mutual Ins. Co.*, 31 C. P. 562; 6 A. R. 427; *Canada Landed Credit Co. v. Canada Agricultural Ins. Co.*, 17 Gr. 418. There was a waiver of the conditions: *Caldwell v. Stadacona Ins. Co.*, 11 S. C. R. 212. Forty days was an unreasonable time in which to require the proofs to be furnished. I refer to *Smith v. City of London Ins. Co.*, 11 O. R. 38; *Peoria Sugar Co. v. Canada F. & M. Ins. Co.*, 12 A. R. 418; *Millville M. & F. Ins. Co. v. Driscoll*, 11 S. C. R. 183; *Graham v. Ontario Mutual Ins. Co.*, 14 O. R. 358; *Hastings Mutual Fire Ins. Co. v. Shannon*, 2 S. C. R. 394. There ought to be a new trial to admit evidence of the insurance of James Peck, the plaintiff's brother, by the defendants, and their knowledge of the property.

John W. Kerr, for the defendants. The plaintiff was informed of the powers of the agent by the printed notices in the application, and the defendants are not bound by what took place between the plaintiff and the agent. I refer to *Logan v. Commercial Union Ins. Co.*, 13 S. C. R. 270; *Western Ass. Co. v. Doull*, 12 S. C. R. 446; *Shannon v. Gore Ins. Co.*, 2 A. R. 396; *Abrahams v. Agricultural Mutual Ass. Ass'n.*, 40 U. C. R. 175; *Billington v. Provincial Ins. Co.*, 2 A. R. 158; *Stickney v. Niagara District Ins. Co.*, 23 C. P. 372.

June 27, 1890. The judgment of the Court was delivered by

Judgment.

Street, J.

STREET, J.:—

The plaintiff at the trial sought to give evidence of certain transactions between the local agent of the company and a brother of the plaintiff, for the purpose of shewing that the plaintiff having become aware of them before the application made by him was justified in believing that the defendants did not regard the condition as to occupation as a material one. This evidence was properly excluded by the Chief Justice. The authority of the agent to make the representations upon the former occasion was not attempted to be shewn; and if authority had been shewn upon the former occasion, it would by no means follow that the company might not have been willing upon the former occasion to do something which they expressly stipulated they would not do upon the subsequent one. It would be extremely dangerous to import into a complete contract in writing, such as we have here, loose conversations and statements by persons having no authority for the purpose, with the object of relieving one party or the other from the results of his own want of proper care, and of controlling the written agreement.

The defendants' local agent called on the plaintiff and took his application for the insurance of this dwelling. All that is stated in the application is that the dwelling is occupied by the plaintiff's son. The plaintiff says that he told the agent that it would become vacant in a fortnight, and that the agent said that would make no difference; but immediately over the plaintiff's signature to the application is a plain printed agreement by him that if he desired to rely upon any information given by him to the agent, he must have it inserted in the application in writing. The wisdom and the necessity for such an agreement are obvious. These applications are the foundation of the contract into which the company enters, and there

Judgment. is no hardship upon the applicant in compelling him after
Street, J. due notice to rely solely upon what he puts in writing and not upon his loose recollections as to what takes place between him and the local agent at the time the application is signed. The authority of the local agent is defined by the application signed by the plaintiff. He has no power to make contracts but only to receive applications. What the plaintiff, in fact, alleges here is that he made a contract with the agent that the insurance should continue notwithstanding that the house should become vacant. The authority of the agent to make any such contract is negatived by the limitation upon his powers to bind the company contained in the application. The assent of the company to any such contract is negatived by the production of the policy with the condition indorsed, making the policy void in case the dwelling should become vacant and remain so for ten days: *Billington v. Provincial Ins. Co.*, 2 A. R. 158.

It is then argued that the condition is not a reasonable one, because the fact that a dwelling may become vacant, it is said, does not necessarily increase the risk.

In many cases it most certainly does increase it very materially, and I can see nothing unreasonable in a company saying that they decline to insure vacant dwellings. That is the effect of their condition here. They say in substance, "We will insure inhabited dwellings—if they cease to be inhabited, then our policy terminates at the end of ten days, unless they again become occupied within that time; and if our policy becomes void from this cause, the person insured, upon surrender of his policy, becomes entitled to a return of a proportionate part of his premium." There appears to be nothing unreasonable in such a condition, and the cases in which it has been considered do not seem so to treat it: *Abrahams v. Agricultural Mutual Ass. Ass'n.*, 40 U. C. R. 175; *Keith v. Quincy Mutual Ins. Co.*, 10 Allen 228.

In this view of the plaintiff's rights, it becomes unnecessary to consider the effect upon them of the delay in putting in the proofs of loss.

We think the motion should be dismissed with costs, and of course without prejudice to the plaintiff's right to recover from the defendants the unearned portion of the premium he has paid, and to which he appears entitled on the surrender of his policy.

Judgment.

Street, J.

[CHANCERY DIVISION.]

PHELPS V. THE ST. CATHARINES AND NIAGARA CENTRAL RAILWAY COMPANY.

*Railways and railway companies—Bondholders' rights to property of—
Judgment creditors' right to garnish earnings—Receiver.*

So long as a railway company is a going concern, bondholders whose bonds are a general charge on the undertaking have no right, even although interest on these bonds is in arrear, to seize, or take, or sell, or foreclose any part of the property of the company. Their remedy is the appointment of a receiver.

The bondholders of the defendants in this case were held not entitled to the moneys claimed by them, which were the earnings of the road deposited in a bank, and which had been attached by judgment creditors of the road.

Decision of BOYD, C., 18 O. R. 581, reversed.

THIS was an appeal from the judgment of BOYD, C. (reported 18 O. R. 581).

The following statement is taken from the judgment of FERGUSON, J.:

"An order was made by the local Judge attaching in favour of the plaintiff, an execution creditor of the defendants, a sum of money which the defendants had on deposit in the Bank of Commerce at St. Catharines, as a debt owing by the bank to the defendants, and afterwards, as I understand, an issue was directed to be tried between certain bondholders and the plaintiffs as to the right to such money. The order has not been left with me.

On an appeal from the order of the local Judge it was decided that while there might be no specific lien over these particular moneys, yet that the bondholders as a

Statement. privileged body were entitled to be satisfied thereout in priority to ordinary creditors such as the plaintiff, and that unless it could be contended that the bondholders had been paid, an issue between them and the attaching creditor should not have been directed: or rather the learned Judge said he did not see for what purpose such an issue should be directed.

The learned Judge held that, it being assumed that the bonds are valid and subsisting securities, it having been shown that the overdue and unpaid interest upon them exceeded the sum in the bank, there was nothing to be attached in respect of which there could be an issue, because the statute protects all the earnings of the company (the defendants) for the benefit of the bondholders upon whose enterprise or capital the undertaking was launched. The bondholders' appeal was therefore allowed, and a certain cross-appeal dismissed, and from this decision is the present appeal."

The appeal came on before the Divisional Court on February 21, 1890, and was argued before FERGUSON and ROBERTSON, JJ.

Collier, for the judgment creditors who appealed. The rights of the bondholders depend on section 35 of 44 Vic. ch. 73 (O.), the special Act incorporating the company. They are, in the words of the section, mortgagees and incumbrancers *pro rata* with all the other holders thereof upon the undertaking and property of the company. The bonds are merely floating securities giving the holder no specific lien upon any portion of the company's assets: *Russell v. East Anglian R. W. Co.*, 3 M. & G. at p. 125; *Hodges on Railways*, 7th ed., pp. 127-8-9, and cases there cited. [FERGUSON, J.—Was there any statute in England putting the bondholders in the same position as in this country?] The Companies' Acts there authorized bonds or mortgage debentures to be issued, which purported to assign to the holders thereof all the property and assets of the company.

The rights of the bondholders under the Act in question can Argument. not be placed on any higher footing. The Legislature did not have in view any different kind of mortgage debenture than that theretofore known in law. By section 23 of the Railway Companies Act of 1867, (Imperial), money borrowed on mortgage, bond, or debenture stock, shall have priority against the company, and the property from time to time of the company over all other claims of ordinary creditors. Yet it was held in *Re Hull, Barnsley, and West Riding Junction R. W. Co.*, 40 Ch. D. 119, that by that section debenture holders acquired no lien or charge which they did not possess before the Act. Their priority only arises when the assets of the company are being dealt with in some proceeding in the nature of an administration. No individual bondholder can take or seize any of the company's property—they must proceed on behalf of all of the same class: *Bowen v. Brecon R. W. Co.*, L. R. 3 Eq. 541. The ordinary creditors can attach anything which the company could assign without the concurrence of the bondholders: *Wheatley v. Silkstone & Haigh Moor Coal Co.*, 29 Ch. D. 715. Tolls can be attached: *Swiney v. The Enniskillen, &c., R. W. Co.*, 2 Ir. Rep. C. L. 338. A transfer of a company's property in payment of a just debt is not an infringement upon the rights of the bondholders: *Wilmott v. London Celluloid Co.*, 34 Ch. D. 147. A company can make a valid charge on a specific asset to secure advances so as to defeat the claims of debenture holders thereto: *In re Hamilton's Windsor Iron Works, Ex p. Pitman and Edwards*, 12 Ch. D. 707. An assignee of freight has been held to be in the same position: *Ward v. The Royal Exchange Shipping Co.*, 58 L. T. N. S. 174; Lindley's Law of Companies, 197. The attaching creditors can claim anything that the company could assign without interfering with the rights of the debenture holders, and the case of *Hubbuck v. Helms*, 35 W. R. 574, shews under what circumstances the latter could enjoin an assignment by the company of its assets. A transfer to pay an honest debt could not be so impeached.

Argument.

Hoyles, Q. C., and *Ingersoll*, for the bondholders. If bondholders can be postponed, they will be cut out of even their statutory lien of preference. The judgment creditors are not in as good a position as any one having a specific charge: *Smith v. The Port Dover, &c., R. W. Co.*, 12 A. R. 288. In many cases cited, the charge given was not the same as here: *In re Hull, Barnsley, and West Riding Junction R. W. Co.*, 40 Ch. D. 119, is decided on an English statute, which gives no charge on the company's property. *Russell v. East Anglian R. W. Co.*, 3 M. & G. at 125, was the same. This company's Act was passed to meet the difficulties in the cases cited. The bonds are a lien on the whole "undertaking," sec. 35. The undertaking is a going concern, which is making a return or growing fruit, and is not worn out or used up: *Blaker v. Herts and Essex Water-works Co.*, 41 Ch. D. 399, at p. 407; *In re Panama, &c., Royal Mail Co.*, L. R. 5 Ch. 318. There is no authority that a bondholder cannot come on his own behalf alone without bringing in the body of the bondholders.

Collier, in reply.

June 9, 1890. FERGUSON, J.:—

On the argument before us it was scarcely contended that the learned Judge was not right in the view stated, that the scope and effect of the bonds held by the bondholders must depend on the proper construction of section 35 of the Act incorporating the defendants, and not on section 95 of the Dominion Railway Act of 1888. This was, as I thought, conceded.

This incorporating Act is the Provincial Act 44 Vic. ch. 73, (O.) (1881). The material part of the 35th section is: "And such bonds shall without registration or formal conveyance be taken and considered to be the first and preferential claims and charges upon the undertaking, and the real property of the company, including its rolling stock and equipments, then existing and at any time

thereafter acquired, and each holder of the said bonds shall be deemed to be a mortgagee and encumbrancer *pro rata* with all the other holders thereof, upon the undertaking and property of the said company as aforesaid.” Judgment.
Ferguson, J.

The money in the hands of the bank and sought to be attached by the plaintiff as a debt owing by the bank to the defendant company is admitted to be money which was tolls and earnings of the company.

The learned Judge says in his judgment that in railway parlance, “undertaking” has been defined to mean the completed work from which returns of money or earnings arise, and that a charge on the “undertaking” means that these earnings are destined for the satisfaction of the charge, referring to *Gardner v. London, Chatham, and Dover R. W. Co.*, L. R. 2 Ch. at p. 217, where Lord Cairns says: “The tolls and sums of money *ejusdem generis*, that is to say, the earnings of the undertaking must be made available to satisfy the mortgage; but, in my opinion, the mortgagees cannot, under their mortgages, or as mortgagees, by seizing, or calling on this Court to seize the capital or the lands, or the proceeds of sales of land, or the stock of the undertaking, either prevent its completion or reduce it into its original elements when it has been completed.”

The learned Judge refers also to *In re Panama, New Zealand and Australian Royal Mail Co.*, L. R. 5 Ch. 318, and *Blaker v. Herts and Essex Water-works Co.*, 41 Ch. D. at p. 407.

Although the language of this section 35 is different from that contained in the English Act, yet when one looks at the English Act and the authorized form of mortgage deed, and takes into consideration the policy of the law in regard to railway undertakings expressed in so many cases, I think the conclusion to be arrived at is, that the effect of the mortgage bond under this section 35 as against the railway company and their property, is the same as that of the mortgage bond or deed in England. Each seems to me to be a mortgage of the “undertaking.”

Judgment. Lord Cairns in the same judgment previously, says :
Ferguson, J. “Moneys are provided for, and various ingredients go to make up the undertaking ; but the term “undertaking” is the proper style, not for the ingredients, but for the completed work, and it is from the completed work that any return of moneys or earnings can arise. It is in this sense, in my opinion, that the “undertaking” is made the subject of a mortgage. Whatever may be the liability to which any of the property or effects connected with it may be subjected through the legal operation and consequences of a judgment recovered against it, the undertaking, so far as these contracts of mortgage are concerned, is, in my opinion, made over as a thing complete, or to be completed, as a going concern, with internal and parliamentary powers of management, not to be interfered with, as a fruit bearing tree, the produce of which is the fund dedicated by the contract to secure and to pay the debt. The living and going concern thus created by the Legislature, must not, under a contract pledging it as security, be destroyed, broken up, or annihilated.”

In the case *Re Panama, &c.*, *supra*, Giffard, L. J., says : “And I take the object and meaning of the debenture to be this, that the word ‘undertaking’ necessarily infers that the company will go on, and that the debenture holder could not interfere until either the interest which was due was unpaid, or until the period had accrued for the payment of his principal, and that principal was unpaid.”

The same proposition is stated by Mr. Justice Kay in *Blaker v. Herts, &c.*, *supra*, and I understand the same to be the meaning of Sterling, J., in the case *Hubbuck v. Helms*, 35 W. R. 574, where the learned Judge quotes from Mr. Justice North in the case *Wheatley v. Silkstone, &c.*, *Coal Co.*, 29 Ch. D. at p. 724, and also from James, L. J., *In re Florence Land and Public Works Co.*, 10 Ch. D. 530, where it is said that so long as the company is a going concern the debenture holders are not entitled to interfere with the rights of the directors to deal with any part of the assets in the ordinary course of business. But as soon as

the company makes default in payment of principal or ^{Judgment.} interest, or is wound up, or as it seems to me, ceases to be ^{Ferguson, J.} a going concern, the right of the debenture holders arises to ask the Court to appoint a receiver of the assets, and to realize their security. In the case before Stirling, J., he was of the opinion that the company had ceased to be a going concern.

In Lindley's Law of Companies, 5th ed., at pp. 196 and 197 the law is stated generally in this way: "If, as is usually the case, it (the debenture) purports to give the holder a charge on the undertaking or the general property of the company, the charge given is what has been called a floating security, that is, it charges the property of the company for the time being, but does not prevent the company from dealing with the property in the ordinary course of its business. Consequently, if a company, after having issued debentures of this nature, mortgages a specific part of its property in the ordinary course of its business, or to obtain an advance of money necessary to carry on that business, the specific mortgagee, whether he had notice of the previous issue of debentures or not, has priority over the debenture holders. On the appointment of a receiver by a debenture holder, or on the commencement of a winding up, the floating nature of the security is at an end, and the charge then becomes effective on the property of the company existing at that time, but not as a rule on capital which has not been called up."

In Kerr on Receivers, 2nd ed., at p. 55, it is said that the appointment of a receiver is the only remedy open to the holders of mortgage debentures of a railway; the right to foreclosure or sale is denied to them. Reference is made to the case *Furness v. Caterham R. W. Co.*, 25 Beav. 614, in which the Master of the Rolls points out the inconvenience of granting either a sale or foreclosure whereby the benefit of the line of railway might be lost to the public; the same case in 27 Beav. 358.

In the case *Simpson v. The Ottawa and Prescott R. W. Co.*, 1 Ch. Cham. 126, the duty of a receiver of a railway

Judgment.
Ferguson, J. company is pointed out as being to receive the gross receipts of the company for the carriage of passengers, freight, mails, &c., and to pay the bills for running expenses thereout. The words in the judgment at p. 129 are: "Out of the moneys so received by him he pays the expenses of the undertaking, and the interest of the mortgagees, and the balance into Court." These are in a quotation from Sir John Romilly in the case *Ames v. The Trustees of the Birkenhead Docks*, 20 Beav. at p. 350.

In *Peto v. The Welland R. W. Co.*, 9 Gr. 455, it is shewn that the appointment of a receiver is the proper remedy of a judgment creditor of the company who has an execution against lands, and the impracticability of selling the lands is pointed out by the learned Judge.

I have examined a large number of authorities bearing more or less upon the subject. It is nevertheless entirely possible that I have not imbibed the correct idea, and I have the greater hesitancy owing to the well known accuracy of the learned Judge whose decision is under review. The conclusion, however, that I have arrived at is that so long as the undertaking is a "going concern," these bondholders have not a right, even though interest on their bonds be overdue and unpaid, to seize, or take or sell or foreclose any part of the property of the defendant company by virtue of the mortgage bonds, and that the remedy—the sole remedy—is as stated in *Kerr on Receivers*, p. 55, before referred to, namely by the appointment of a receiver, in which case the undertaking "would be continued a going concern, the intention of Parliament carried into effect, and the interests of the public in the undertaking preserved, unless and until a "winding up" or some other fatal disaster should become the inevitable.

If on the contrary of this the bondholders had the right whenever interest was overdue and unpaid to claim any and every sum of money earned by the undertaking, that could be found by them, and acted according to such right, the consequence would be that the undertaking must cease to be a going concern, for a management of it would not under such circumstances be reasonably possible.

If there were nothing more to be said, I should be of the ^{Judgment.} opinion that these bondholders are not entitled to the ^{Ferguson, J.} money in question by reason of their being such holders even though there is overdue interest unpaid.

The case *Swiney v. The Enniskillen, &c. R. W. Co.*, 2 Ir. R. (C. L.) 338; seems to me to have a very important bearing upon the question. There, money that had been tolls of the railway company became an acknowledged debt from another company under circumstances that I need not detail here. It was garnished by a creditor of the company. Debenture mortgagees of the tolls of the defendant company moved to discharge the garnishee order. There was some contention based on the ground that the order was absolute, but it was opened up by the Court, at all events, for the purposes of the motion. In the argument it was admitted that it had been open to the mortgage bondholders to have had a receiver appointed, from which I assume that some interest or principal was overdue and unpaid.

The learned Judges, apparently gaining some of their light from English decisions, in deciding against the contention of the bondholders seem to emphasize the fact that nothing had been done by the bondholders by way of putting themselves in a position to realize upon their bonds, and the fact also that the moneys in question were not unpaid tolls. Fitzgerald, J., at p. 347 said: "If this sum of money sought to be attached had consisted of unpaid tolls, a nice question would have arisen; but upon that it is unnecessary for us to express any opinion, for it appears by the admission of the Irish North Western Company, that this sum represents tolls actually received. It appears to me, therefore, that these debenture holders can, under the circumstances, establish no claim to it. It would have been impossible for them to have touched it in the hands of the Enniskillen, &c., Co., and, therefore, they have no grounds for coming here," &c. (This Enniskillen Co., were the company that issued the bonds).

Some of the other Judges take the same grounds and

Judgment. liken the case of the bondholders to that of the mortgagee
Ferguson, J. of lands seeking to obtain rents of the lands that had been paid over to the mortgagor before he the mortgagee had given any notice or done any act to obtain possession of the land. George, J., however, I think, grounded his judgment on the garnishee clauses of the Common Law Procedure Act.

In the present case I incline to think that the money in the hands of the Bank was so there as to make the bank a debtor to the defendant company, but all the evidence on this subject is not here.

In the affidavit of Mr. Cross, the banker, he says: The account at which the money was is headed, "St Catharines and Niagara Central Railway Co., Traffic Account, Richard Wood, Secretary-Treasurer." He says when moneys were drawn from the account the checks were similar to the one shown him, and that is not here. I do not know what it was like. He also says that at the time of the opening of the account a copy of some resolution was shown him. That also is not here, and I do not know what it was.

Some of the affidavits show that this money belonged to the Michigan Central Railway Co., and that it was intended to be paid them as soon as the accounts between the two railway companies could be adjusted. The use of the word "belonged" may however be taken I think to mean no more when taken in conjunction with some other parts of the evidence than that a part of it had been received to the use of that company, and that it was intended to pay to them this sum in liquidation of that and other demands. There is not here, I think, evidence enough to show that this was not a debt owing from the bank to the defendant company, and if it was such a debt I see no good reason why the plaintiff should not have the benefit of the garnishee clauses of the Act. I refrain from deciding that it was or was not a debt from the bank to the defendant company, because I have not all the evidence.

I am of opinion, however, that the bondholders had not

and have not a right to this money, and I am very hum- Judgment.
bly of the opinion that the judgment appealed from should Ferguson, J.
be reversed.

ROBERTSON, J. :—

The 35th section of the Act incorporating the St. Catharines and Niagara Central Railway Company, 44 Vic. ch. 73 (O.), declares that the directors of the company, after the sanction of the shareholders shall have been first obtained at any special or general meeting, called for that purpose, &c., shall have the power to issue bonds for the purpose of raising money for prosecuting the said undertaking, and such bonds shall, without registration or formal conveyance, be taken and considered the first and preferential claims and charges upon the undertaking, and the real property of the company, including its rolling stock and equipments, then existing, and at any time thereafter acquired, and each holder of the said bonds shall be deemed to be a mortgagee and incumbrancer *pro rata* with all the other holders thereof, upon the undertaking and property of the said company as aforesaid.

The plaintiffs are judgment creditors of the defendants the St. Catharines and Niagara Central Railway Company, to the amount of \$1,063.73. The garnishees, the Canadian Bank of Commerce, have on deposit to the credit of the traffic account of the defendants \$587.72; the claimants are holders of the company's bonds issued under and by authority of the above section of the defendants' Act of Incorporation, and there are issued under that section, bonds to the amount of £46,000 sterling: and the question is whether this sum on deposit in the bank can be attached to pay the plaintiff's judgment in priority to the claim of the bondholders.

The matter comes before this Court by way of appeal from the judgment of the learned Chancellor who allowed an appeal by the bondholders against an order made by the learned local Judge of the High Court at St. Catharines,

Judgment. directing an interpleader issue to be tried between the bondholders and the execution creditors as to whether the former are entitled to the said sum as against the said creditors.

The moneys in question are the earnings of the said road, and the question is whether these bondholders by virtue of these securities have a preferential claim upon them.

I have had the advantage of reading and considering my brother Ferguson's judgment, and the cases referred to by him, and I have come to the same conclusion that he has arrived at. I cannot see how any ordinary creditor could enforce his claim if it were held that the bondholders had a right to step in and seize the daily earnings of the undertaking after they are deposited in the bank. The whole of the undertaking, including the rolling stock and all other loose property belonging to and used in the working of the railway, is charged with the payment of the bonds or debentures, but nothing more, as I understand it. If then these bonds or debentures are in default the only remedy open to the holders is the appointment of a receiver. The undertaking is still a going concern, and its earnings would then be applicable after the payment of all running expenses, &c., to the payment of interest and principal due on the bonds, &c. But so long as the undertaking is in the hands of the company and is being worked by them, the bondholders in my judgment are not in a position to claim against ordinary creditors payment to them of any money which may be due to the company in the hands of any of its debtors. I am therefore of opinion, with great deference, that the judgment appealed against should be reversed, and with costs.

G. A. B.

[CHANCERY DIVISION.]

WHITE V. TOMALIN.

*Contract—Statute of Frauds—Extrinsic parol evidence as to parties—
Specific performance.*

Although extrinsic parol evidence may be given to identify one of the parties, it cannot be given to supply information as to the person to whom an offer in a memorandum required to be in writing by the Statute of Frauds was made or for whom it was intended.

And where an offer, signed by the defendant, to exchange a stock of goods for land did not in any way designate the person to whom it was supposed to be made or for whom it was intended, and such person could not be ascertained without extrinsic parol evidence adding to the memorandum:—

Held, not to be an agreement in writing within the statute so as to entitle the plaintiff to specific performance:—

Held, also, that an acceptance of the offer beneath the defendant's signature, signed by the plaintiff's assignor, did not cure the defect.

THIS was an appeal from the judgment of FALCON-Statement.
BRIDGE, J.

The action was for the specific performance of an alleged agreement for the sale of goods (set out in the judgment of FERGUSON, J.) and was tried before FALCONBRIDGE, J., at the Toronto Assizes, on December 5th, 1889.

Wallace Nesbitt, for the plaintiff.

Laidlaw, Q. C., for the defendant.

February 11th, 1890. FALCONBRIDGE, J.:—

The alleged agreement purports to be a sale of a stock of groceries, &c., taking in payment therefor one hundred acres of land. The document does not name any purchaser, and is therefore a mere offer in writing, not addressed to any one, signed by the defendant.

The signature of McMahon, the assignor and alleged agent of plaintiff, follows that of the defendant.

This would not appear to have been an execution of the paper by McMahon, (if his execution would validate the alleged memorandum,) for McMahon appends a formal

Judgment. acceptance or agreement to purchase the stock and convey
Falconbridge, the land.

J.

I am of the opinion that neither under the fourth nor the seventeenth sections of the Statute of Frauds is there a sufficient memorandum or agreement in writing : *Williams v. Jordan*, 6 Ch. D. 517 ; *Vandenbergh v. Spooner*, L. R. 1 Ex. 316.

Other objections were urged against plaintiff's right to specific performance or damages.

Action dismissed with costs.

From this judgment the plaintiff appealed to the Divisional Court, and the appeal was argued on February 22nd, 1890, before BOYD, C., and FERGUSON and ROBERTSON, JJ.

Aytoun-Finlay and *Schoff*, for the appeal. The agreement is sufficient within the statute. The offer was handed to McMahon, and he accepted it before it was withdrawn. Only reasonable certainty as to the parties and terms is required. In *Cooke v. Oxley*, 3 T. R. 653, the offer was to be kept open until a certain time, and the vendor was bound, but the vendee was not. Here the vendor was not bound unless he chose to leave the offer open. In *Williams v. Jordan*, referred to by the trial Judge, the offer was not accepted. No one was mentioned as principal, and the agent did not accept. A proposal in writing accepted by parol is sufficient : *Reuss v. Picksley*, L. R. 1 Ex. 342. An unconditional acceptance such as we have here is quite sufficient. If the names of both parties appear and they can be identified, the contract is sufficient : *Sarl v. Bourdillon*, 1 C. B. N. S. 188 ; Benjamin on Sales, 4th ed. 205 ; *Warner v. Wellington*, 3 Drew. 523. *Vandenbergh v. Spooner*, L. R. 1 Ex. 316, relied on by the trial Judge, was characterized as an extreme case by both Wills and Byles, JJ., in *Newell v. Radford*, L. R. 3 C. P. 52. Even if a variation is inserted, subsequent assent would validate the agreement : *Stewart v. Eddowes*, L. R. 9 C. P. 311.

If an erroneous representation is made, it is not a ground for rescission unless it varies the whole contract : *Kennedy v. The Panama, &c., Co.*, L. R. 2 Q. B. 580. The plaintiff's name might be supplied : *Allan v. Bennet*, 3 Taunt. 169.

Bain, Q. C., and *Beynon*, Q. C., for the defendant. The memorandum is not sufficient within the statute. There was no contract with McMahon, as he did not own the land, and so there was no mutuality. The fact that the plaintiff was the owner, will not put her in any better position. There was no mutuality at the time the contract was made. Even if the plaintiff wished to adopt the bargain made by McMahon as her agent, she has not signed the acceptance. The document does not shew who is vendor or who is vendee. The name of the vendee cannot be supplied by parol evidence. Parol evidence may be given to explain or construe a contract, but not for the purpose of making the contract. If the seller's name should appear, so should the purchaser's : *Vandenbergh v. Spooner*, L. R. 1 Ex. 316. We also refer to *McClung v. McCracken*, 3 O. R. 596 ; *Jarrett v. Hunter*, 34 Ch. D. 182.

Aytoun-Finlay, in reply, referred to Blackburn on Sales, 2nd ed., p. 54 ; Benjamin on Sales, 4th ed., p. 192 ; *Kennedy v. Oldham*, 15 O. R. 433.

June 9, 1890. BOYD, C.:—

The evidence leaves no doubt that there was a contract between the parties, but the Statute of Frauds having been pleaded, the question to be determined is whether the contract is manifested in conformity with the requirements of that statute.

It purports to be a contract of buying or selling in the way of exchange, of which the plaintiff seeks to take advantage, and enforce specifically as being a contract made with or enforceable by her. The statute requires that such a contract shall be evidenced by some sufficient memorandum in writing signed by the party to be charged.

Judgment.

Boyd, C.

The plaintiff sues as assignee of McMahon, and cannot have greater rights than he possessed. McMahon is not named or described or referred to specifically or indeed in any way in the writing, signed by the defendant, as the person to whom the offer was made. For it is to be noted that the memorandum sued on is not an agreement, but nothing more than an offer or proposal of the defendant to transfer his stock, &c., for a certain piece of land. The plaintiff seeks to make out an agreement by adding to it at the bottom an acceptance in writing signed by McMahon. But the offer, originally vague and indefinite as to the person intended, cannot be made certain in this way: for any other person as well as McMahon could have, with as much reason, appended a similar acceptance. There is nothing in the offer which enables McMahon or the plaintiff to incorporate this acceptance with the offer so as to authenticate the whole by the signature of the defendant.

It is evident from the frame of the offer that we cannot know to whom that offer was made, or for whom it was intended without parol evidence, and this not merely to explain, but to supplement the writing. Evidence may be given to identify one of the parties named or described in the memorandum of the bargain, but not to supply information in that regard.

I had occasion to explore somewhat this branch of the law in the cases of *Wilmot v. Stalker*, 2 O. R. 78; and *Richard v. Stillwell*, 8 O. R. 511, in which many authorities are collected. To these may be added *Williams v. Jordan*, 6 Ch. D. 517, which is very much in point, and was relied on by the Judge of first instance, and the important case in the Privy Council of *Williams v. Byrnes*, 1 Moo. P. C. N. S. 154, in which is a *dictum* hard to understand. See also *Grafton v. Cumings*, 99 U. S. 100, which follows the same line of authorities.

Force of authority compels me to give effect to this objection, based on the insufficiency of the written evidence of the contract, but considering the dealings of the parties

in the prosecution of the bargain which really existed between them, I favour withholding costs in this Court, though the judgment of the Court below is affirmed.

Judgment.

Boyd, C.

FERGUSON, J.:—

The action is for specific performance of an alleged contract for the exchange of a certain store or stock of goods for a farm. Amongst other defences, the defendant says that the alleged contract is void by reason of ambiguity and uncertainty, and under the provisions of sections 4 and 17 of the Statute of Frauds.

The trial took place before my brother Falconbridge, who directed a judgment to be entered, dismissing the action with costs.

The paper signed by the defendant and relied on by the plaintiff is as follows:—

“I hereby agree to sell my stock of groceries, provisions, glassware, crockery, apples, and all other goods in connection with my business in Brampton, including wagons, sleigh, harness and hay, besides other goods in cellar, storehouse, barn, (horse excepted), and agree to take in payment for said stock of goods, &c., &c., one hundred acres of land, being lot 5, concession 3, township St. Vincent, county Grey, at present occupied by one Richard White, being lot shown to me by Mr. W. White: possession of said land to be given on or before the first day of January, 1888, and possession of store and stock (excepting dwelling) to be had soon as papers in connection with transfer of land is completed, and all stock and goods sold from this date to be accounted for by me. Rent of store to be at the rate of two hundred dollars per year, payable monthly; and further agree to pay the sum of \$500, one half in three months from date and half in six months from date; and further agree to pay a certain mortgage on said farm of two thousand five hundred dollars, bearing six and three-quarters per cent. interest. All arrears and interest on said mortgage to be paid up to date. Possession of dwell-

Judgment. ling to be had soon as Mr. Tomalin can conveniently
 Ferguson, J. arrange to move. A correct account of all goods from this
 hour to be kept and accounted for by me, and further
 agree to include in stock certain stock of groceries and
 other goods just bought by me in Toronto.

“JOSEPH TOMALIN.

“F. B. McMAHON.

“Brampton, 10th Nov., 1888, 4 o’c. p.m.”.

Sometime after the date of this document McMahon signed upon the same paper what has been called an acceptance, in these words:

“I hereby agree to purchase the above mentioned stock on the terms aforesaid, and to convey the land intended to be taken in exchange.

“F. B. McMAHON.”

He also executed an assignment (which is endorsed on the same paper) of all his interest in the document to the plaintiff. This bears date the 10th November, 1888, but the evidence shews that the fact took place long after the day.

On the part of the defendant it was contended that where the question is, whether or not the memorandum is sufficient to satisfy the requirements of the statute, evidence of the surrounding facts and circumstances at the time of the signing of it is not admissible for the purpose of ascertaining the proper meaning to be given to the language employed. This contention was, I think, quite erroneous. The authorities are abundant to shew that evidence of such facts and circumstances can be given in evidence: *Macdonald v. Longbottom*, 1 Ell. & Ell. 977; the same case in Error, *ib.* 987; *Spicer v. Cooper*, 1 Q. B. 424; *Newell v. Radford*, L. R. 3 C. P. 52, in the last of which reference is made to the *Vandenbergh v. Spooner*, L. R. 1 Ex. 316.

In Blackburn on Sales at p. 47, it is said that precisely the same evidence is admissible to shew what the writing refers to, when it is a memorandum of a bargain within the statute, as would be admissible to

explain it if it were a memorandum of a bargain not within the statute; but when it is ascertained to what the writing refers, the statute steps in, &c. The same subject is discussed somewhat in Benjamin on Sales, 4th ed., p. 198. Judgment.
Ferguson, J.

It is said (Blackburn on Sales, p. 47) that the general rule seems to be, that all facts are admissible which tend to shew the sense the words bear with reference to the surrounding circumstances, concerning which the words were used. But while this is so, no parol evidence can be received to vary or add to the memorandum.

The writing in the present case employs the word "agree," but is only an offer. It can be no more than an offer. This offer is not made to any one. It is not in any manner addressed to any one. It is signed by the defendant and by McMahon. The latter may have signed as a witness or otherwise. He is not named or mentioned in the memorandum, nor does the memorandum specify anything or any act to be done by him. His name constitutes no part of the writing signed by the defendant. No parol evidence of intention can be given or received, and, so far as the writing has concern, it seems to me that any other person would have as high a right or as much authority to accept the offer of the defendant as McMahon.

The writing is, I think, not a memorandum that is sufficient as a memorandum of an "agreement" under the provisions of the fourth section, or a note or memorandum of a "bargain" under the provisions of the seventeenth section of the statute. It is said that the fourth section is construed more rigorously than is the seventeenth section, but, in either case, it is settled, I think, that it is indispensable that the memorandum should show not only who is the person to be charged, but also who is the party in whose favour he is charged. The name of the party to be charged is required by the statute to be signed so that there can be no question as to the necessity of his name in the writing; but it is said that the authorities have equally established that the name or a sufficient description of the other party is indispensable, because without

Judgment. it no contract is shewn, inasmuch as a stipulation or
Ferguson, J. promise by A. does not bind him save to the person to
whom the promise was made, and until that person's name
is shewn it is impossible to say that the writing contains
a memorandum of the bargain: Benjamin, pp. 202 and 203.

In *Williams v. Lake*, 2 Ell. & Ell. 349, the memorandum
was held insufficient under the 4th section, because the
name of the person for whom the document was intended
did not in any way appear upon the face of it, so that it
did not contain the names of both the parties to the con-
tract.

In *Williams v. Byrnes*, 1 Moo. P. C. N. S. at 195,
196, it is said "The words require a written note of a
bargain or contract * * . This language cannot be
satisfied unless the existence of a bargain or contract
appear evidenced in writing, and a bargain or contract
cannot so appear unless the parties to it are specified,
either nominally or by description, or reference." There is
one passage in that case occurring at p. 198, that I am
willing to say that I cannot understand or reconcile with
other parts of the judgment.

In the case *Rossiter v. Miller*, 3 App. Cas. at p. 1147, Lord
O'Hagan says, "The parties to a contract in writing must,
no doubt, be specified, but it is not necessary that they should
be specified by name." And in the same case, Lord Black-
burn, at p. 1153, says: "And though the construction by
which it is held that there can be no memorandum of the
agreement unless the writing shews who the parties are, *is
now inveterate*, it is not necessary that they should be named.
It is enough if the parties are sufficiently described to fix who
they are without receiving any evidence of that character
which Sir James Wigram in his Treatise calls evidence
'to prove intention as an independent fact.'" The judg-
ment of Sir George Jessel, M.R., in the case *Williams v.
Jordan*, 6 Ch. D., at p. 520, referring to and following
Warner v. Willington, 3 Drew. 523, is to the same effect.
There the letter containing the offer was addressed "Sir,"
but the learned Judge was unable to ascertain who was
meant by the word "Sir."

There are other authorities that might be referred to Judgment. showing the same thing, but it does not appear to me to Ferguson, J. be necessary further to pursue the matter here.

In the present case, the offer signed by the defendant does not name, or in any way, designate the person to whom the offer is supposed to be made, and such person cannot be ascertained without introducing extrinsic parol evidence, adding to the memorandum, which cannot be done. In this respect the case seems to me clearly different from the case *Richard v. Stillwell*, 8 O. R. 511, in which the parol evidence received was simply, as it appears to me, in the nature of evidence shewing the contents of a lost document. The envelope on which the name and address of the "other party" had been written by the sender was lost. As said in the judgment, if the letter sealed up had been carried into Court the letter and envelope would be considered as one paper, the paper that had been sent to and received by the "other party." And further, suppose the old method of sending letters had been adopted, the superscription containing the name and address of the "other party" would have been actually upon the same paper as the offer, and could not have been lost unless the offer itself had been lost, and if all had been lost parol evidence showing the contents of the lost document could surely have been given, and it cannot make any difference that only part was lost.

The supposed acceptance by McMahon, as I have already said, does not in my opinion help the case. The offer does not show that it was made to him, and there is no further or subsequent writing signed by the defendant.

At the time of the making of the supposed assignment to the defendant McMahon had not, I think, anything, or any right (in the face of a plea setting up the statute) to assign, and if so this cannot help the plaintiff.

I concur in the judgment of the Chancellor, being of the opinion, for the reasons that I have endeavored to state, that the memorandum relied on by the plaintiff is fatally defective.

ROBERTSON, J., concurred.

G. A. B.

[QUEEN'S BENCH DIVISION.]

BRIGGS V. SEMMENS ET AL.

Way—Easement—Severance of tenement by devise—Reasonable enjoyment of parts devised—Necessary rights of way.

Upon the severance of a tenement by devise into separate parts, not only do rights of way of strict necessity pass, but also rights of way necessary for the reasonable enjoyment of the parts devised, and which had been and were up to the time of the devise used by the owner of the entirety for the benefit of such parts.

Statement.

THIS was an action brought to try the right claimed by the defendant McDonough to use a certain way and to remove as a cloud upon the plaintiff's title a grant by the defendants Sarah and A. W. Semmens to McDonough, of the way in question, and was heard before STREET, J., at Hamilton, without a jury, on the 9th October, 1889.

The facts are fully set out in the judgment of STREET, J.

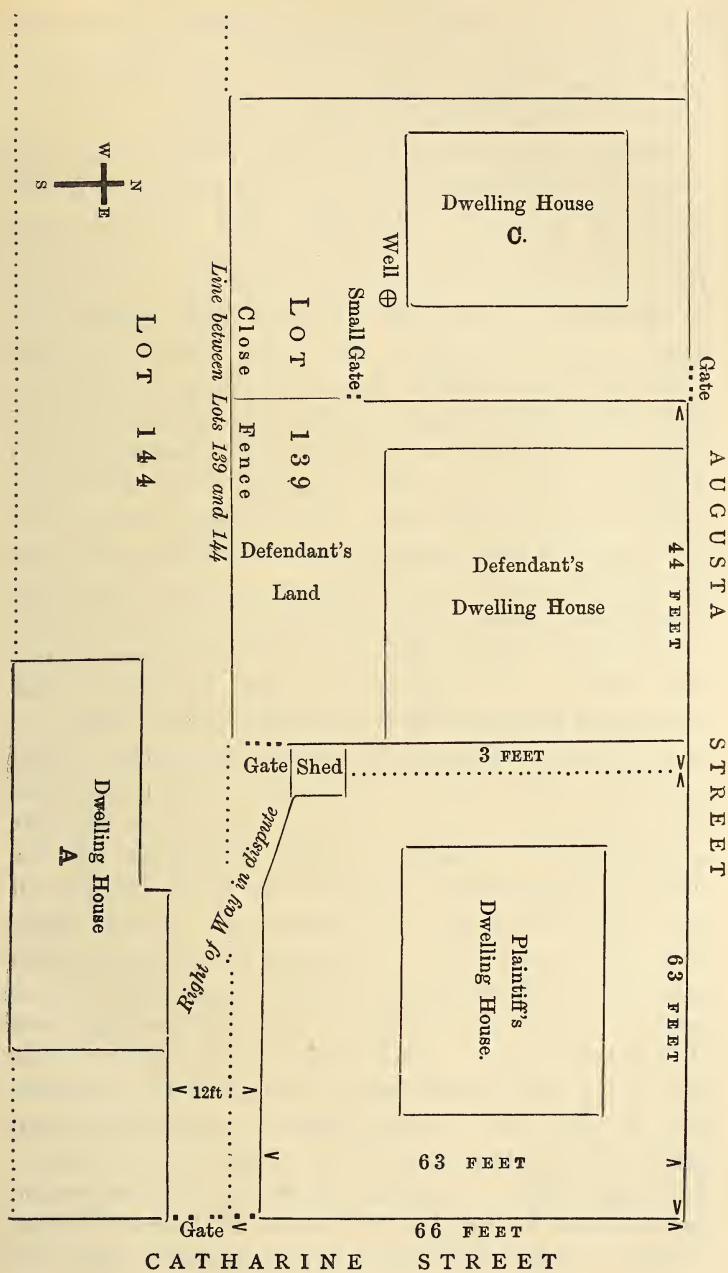
Lynch-Staunton and O'Heir, for the plaintiff.

Teetzel, for the defendants Sarah and A. W. Semmens.

J. W. Nesbitt and Martin Malone, for the defendant McDonough.

October 12, 1889. STREET, J. :—

The accompanying sketch shews the position of the property.



Judgment.

Street, J.

At the trial I disposed of certain questions of fact and law which were in dispute, and it is now not necessary that I should refer to them, save in so far as they bear upon the decision of the remaining questions.

Hannah Bell died in the year 1885, being owner in fee of lots 139 and 144, at the corner of Augusta and Catharine streets in the city of Hamilton. She lived for many years before and down to about the time of her death in the house on lot 144 marked dwelling-house A.; her son-in-law, Charles Barlow, had for several years occupied the easterly part of lot 139, at the corner of the two streets above mentioned, and had fenced in the part occupied by him (surrounded by dark lines upon the sketch) having a frontage of 63 feet on Catharine street and 66 feet on Augusta street; the whole frontage of lot 139 upon Catharine street is 66 feet. The remaining three feet of the Catharine street frontage, and the nine feet of lot 144 adjoining it on the south, were left as an alley or lane with a gate upon Catharine street, widening out at the west end so as to afford access to the rear part of the parcel of land now owned by the defendant; a gate opened from the west end of this lane into the defendant's land. The property now owned by the defendant was constantly occupied during Mrs. Bell's lifetime by tenants to whom she from time to time let it, and to whom she always gave the right when letting the premises to them of using the lane for the purpose of taking in their coal and wood, and they all did in fact use this lane for that purpose. The dwelling-house now owned by the defendant was bounded on the east by the land occupied by Barlow; there was a vacant space to the west of it between it and the dwelling-house C. of between nine and ten feet in width, all but about two and a half feet of which belonged to the parcel of land let with that dwelling house; a gate opened from this upon Augusta street, and the plaintiff endeavoured to shew that a lane or roadway had been left between the two houses to be used by the tenants of those two houses jointly. I found upon the evidence however that this

roadway always belonged exclusively to the tenants of the house C., although with their permission the tenant of the other house had now and then made use of it. No gateway for waggons led from the defendant's land to the land let with house C., but a small gateway existed through which the tenant under Mrs. Bell of the defendant's land passed in order to draw water from a well sunk near the corner of house C., which was used for supplying water to both houses.

Judgment.

Street, J.

In 1885 Mrs. Bell died, and by her will she made the following provisions :

"Sixth. I give and devise and direct that the easterly 63 feet of lot 139, on the south-west corner of Catharine and Augusta streets shall go to and belong to my daughter Jane Barlow ; and I give and devise and direct that the 41 feet of said lot 139 immediately adjoining the said 63 feet shall go to and belong to my daughter Sarah Semmens ; and I give and devise and direct that the remainder of said lot 139, containing 36 feet, more or less, of the westerly part thereof, shall go to and belong to my daughter Mary Ann Hilmer.

"Seventh. I give and devise and direct that the part of lot 144 now occupied by me, situate on the west side of Catharine street, * * shall go to and belong to my son John Bell."

On 28th April, 1886, Sarah Semmens and her husband conveyed to the defendant McDonough the 41 feet of land devised by the will to Sarah Semmens, adding to the description of the land granted the words : " Together with the right of way over and across a certain roadway running from Catharine street into the rear portion of said premises ; " and also granting the alleged Augusta street roadway. The insertion of the latter roadway was, however, satisfactorily accounted for.

On 25th April, 1889, Jane Barlow and her husband conveyed to the plaintiff the easterly 66 feet of lot 139, " Together with such right to use the alley to the south of the lands hereby conveyed as the said parties of the first part are now entitled to."

Judgment. The defendant McDonough having insisted upon his right to use the alley from Catharine street to the rear of his land, this action was brought to try the right.

Street, J.

It will be seen from the description of the lands devised in the will, that the devise to Jane Barlow covers the whole easterly 63 feet of lot 139, and includes in that description the portion of the lane leading from Catharine street, which gives access to the gate opening from it into the defendant's land. The land devised to Jane Barlow is not made subject in terms to any right of way, nor is any right of way over this lane devised in terms to Sarah Semmens. The question must, therefore, be whether the circumstances are such as to require the will to be construed as devising to Sarah Semmens by implication the right of way which her grantee, McDonough, claims over the lands devised to Jane Barlow.

I think that the question here is governed by the decision in *Pearson v. Spencer*, 3 B. & S. 761. That case, decided in 1863, has been sometimes referred to as having been decided upon the ground that the way there in question was a way of necessity, but the judgment does not so put it. The testator in that case owned a farm; certain fields of this farm, called B., he had let to a tenant, and the remainder he retained for himself; the portion B. was surrounded by the lands of other persons except where it adjoined the land retained by the testator. The road used by the tenant of B. led from the highway through the land retained by the testator until it reached a fence bounding B.; it followed this fence on the testator's side of it for some distance, then re-entered the testator's land, and after passing through it, finally ended in the farm yard of B. The testator devised to one son the fields called B. and to another son the fields which he had retained in his own possession, making no reference to roads. The latter devisee admitted his brother's right to the road until it reached the fence bounding his land, but contended that from that point his brother should make a road through his own land B., and this was the whole

question between them. It was held in the Exchequer Chamber that the devisee of B. portion of the farm was entitled to use the road in the same position as it was in the testator's lifetime; Erle, C. J., saying of the devise of B. portion: "It falls under that class of implied grants where there is no necessity for the right claimed, but where the tenement is so constructed as that parts of it involve a necessary dependence, in order to its enjoyment in the state it is in when devised, upon the adjoining tenement. There are rights which are implied, and we think that the farm devised to the party under whom the defendant claims could not be enjoyed without dependence on the plaintiff's land of a right of way over it in the customary manner."

Judgment.

Street, J.

That case cannot, I think, be distinguished from the present, for, like the present case, it involved rights under a will containing none of those general words which in other cases have assisted in the construction of the devise.

Pollden v. Bastard, L. R. 1 Q. B. 156, was decided in the Exchequer Chamber in 1865, two years after *Pearson v. Spencer*, and the judgment of the Court there was also delivered by Erle, C. J. It was a case also between two devisees who took adjoining properties under the same will, the defendant, the devisee of one of the properties, claiming a right which had been exercised during the lifetime of the testator by the tenants of it, to take water from a well upon the other property. The will contained no general words, and the right was held not to exist, upon the ground that the right to go to a well and take water is neither a continuous easement nor an easement of necessity. No reference is made to *Pearson v. Spencer*, and I think it is plain that in speaking of an easement of necessity Erle, C. J., does not mean a way of necessity in the strict sense of the term, but an easement necessary in order to enjoyment of the property devised in the state it is in when devised; and he again asserts the opinion that such easements upon a severance of tenement will pass by implication of law without words of grant.

Judgment.

Street, J.

In *Thomas v. Owen*, 20 Q. B. D. at p. 231, the principle is reasserted that such an implication may arise in the case of a formed road made over an alleged servient tenement to and for the apparent use of the dominant tenement. To the same effect is the language of Lord Campbell in *Ewart v. Cochrane*, 4 Macq. at p. 122, and that of Kay, J., in *Brown v. Alabaster*, 37 Ch. D. at p. 507.

In *Harris v. Smith*, 40 U. C. R. 33, a question of the same character came up on a demurrer. What was really decided in that case was that the right of way claimed by the defendant was not so described in the pleadings as to bring it within any of the classes of easements which had been held to pass by implication without words apt for the purpose. Construing the term "easement of necessity" in the same manner as that in which it was used by Erle, C. J., in *Pearson v. Spencer* and *Polden v. Bastard*, there appears to be nothing in the opinions expressed by the members of the Court of Appeal in *Harris v. Smith* inconsistent with the English cases to which I have referred.

In order to define the particular class to which the present case belongs and to distinguish the decisions which I think apply to it, from the numerous ones upon the same branch of law which do not apply to it, I recapitulate here its characteristics.

Both parties claim under the same instrument, that instrument being a will; there are no general words used from which any intention to pass rights or easements can be gathered; the easement claimed is a right of way having a gate at each end; it is not a way of necessity in the strict sense of the term, but the tenement of the defendant, with which it has been for many years used, is so constructed as that parts of it involve a necessary dependence, in order to the enjoyment of the tenement in the state it was in when devised, upon the adjoining tenement of the plaintiff for the right of way claimed.

I am of opinion, therefore, that under the devise to Sarah Semmens in the present case there passed by implication

to her a right to use the lane leading to her land from Catharine street, because the use of that lane was necessary in order that she might enjoy the land devised to her in the state in which it was at the time of the devise. This right passed with her conveyance of the land to the defendant, and the defendant is entitled to assert it. I have not overlooked the fact that the will gives to Sarah Semmens three feet of the land which is fenced in with the land devised to Jane Barlow and a portion of her shed.

Judgment.

Street, J.

Had a portion been taken away by the testatrix from Jane Barlow's lot and given to Sarah Semmens, sufficient to make a new lane, it is possible that a question might have arisen as to whether it had not been intended that this should be given for the purpose of a new and independent road; but the strip given, being only three feet in width, cannot give any assistance to such a contention.

The action must, therefore, be dismissed with costs.

The owner of dwelling-house A. on the south side of the lane in question, not having been made a party to the action, will still be at liberty to contest the defendant's right to use it if so advised, and this judgment will not preclude him from so doing.

The plaintiff appealed to the Divisional Court from this judgment.

The appeal was argued before ARMOUR, C. J., and FALCONBRIDGE, J., on the 6th February, 1890.

Moss, Q. C., and Lynch-Staunton, for the plaintiff. The plaintiff proved a possessory title before the death of Mrs Bell to the easterly portion of lot 139, with a frontage on Catharine street of 66 feet. The fact of Mrs. Bell having put Charles Barlow in possession of the 66 feet, as proved, and the other evidence admitting his ownership, established an admission of title in Barlow by Mrs. Bell, and established a conventional line between Barlow and Hannah Bell at the northerly limit of lot 139. The evidence did not disclose any necessity for an implied right of way over the way in question, and even if it

Argument.

should be held that the plaintiff's only title is under the will of Mrs. Bell, there can be no right of way, as claimed, implied from the terms of the will. If there is any implied grant of a *quasi* easement or way of necessity arising from the devise of the forty-one feet to Mrs. Semmens, it would be over the alley-way between the lands devised to Mrs. Semmens and Mrs. Hilmer. There is no evidence that the proper enjoyment of the lands of the defendant McDonough is so necessarily dependent upon the use of the alley as to support the judgment.

They referred to *Findley v. Pedan*, 26 C. P. 483; *Pearson v. Spencer*, 1 B. & S. 571; 3 B. & S. 761; *Harris v. Smith*, 40 U. C. R. 33; *Brett v. Clowser*, 5 C. P. D. 376; *Langley v. Hammond*, L. R. 3 Ex. 161; *Polden v. Bastard*, L. R. 1 Q. B. 156; *Maughan v. Casci*, 5 O. R. 518; *Young v. Wilson*, 21 Gr. 144, 611; *Shepherdson v. McCullough*, 46 U. C. R. 573; *Watts v. Kelson*, L. R. 6 Ch. 166.

J. W. Nesbitt, Q.C., (with him *Martin Malone*), for the defendant McDonough, contra, referred to *Brown v. Alabaster*, 37 Ch. D. 490.

McBrayne, for the defendants Sarah and A. W. Semmens.

June 27, 1890. The judgment of the Court was delivered by

ARMOUR, C. J.:—

The judgment of my brother Street is, in my opinion, right and ought to be affirmed.

It was contended that Barlow had acquired a title by possession to the three feet claimed as part of the right of way and in dispute as part of the right of way in this action, but this contention is untenable, for he fenced it out into the alley-way, and the owner of it, Mrs. Bell, always occupied and used it as much as he did, and consequently her title to it was not extinguished.

It was also contended that, by agreement with Mrs.

Bell, Barlow had become the equitable owner of the land devised to his wife by Mrs. Bell, and was entitled to a conveyance thereof from Mrs. Bell, but this was not established in my opinion by the evidence, and no such case was made by the pleadings, and it cannot be done now.

Judgment.

Armour, C.J.

The question therefore is whether the devise by the will of Mrs. Bell to Sarah Semmens of the forty-one feet carried with it by implication the right of way in question; and this involves a question of fact as well as one of law; the question of fact being, was this right of way necessary to the reasonable enjoyment of the land devised to Mrs. Semmens; and the question of law being, if such, did it pass by implication under the devise.

The evidence plainly shews that this right of way was necessary to the reasonable enjoyment of the land devised to Mrs. Semmens, and the learned Judge has so found, and I adopt and concur in his statement of facts set forth in his judgment, and find them to be entirely supported by the evidence.

Being such, did this right of way pass by implication to Mrs. Semmens under the devise to her of the forty-one feet? I am of opinion that it did, and that upon the severance of a tenement by devise into separate parts, such as was effected by the will of Mrs. Bell, not only do rights of way of strict necessity pass, but also rights of way necessary for the reasonable enjoyment of the parts devised, and which had been and were up to the time of the devise used by the owner of the entirety for the benefit of such parts.

"By the grant of a ground, is granted a way to it; *i. e.*, all usual ways; and unless there be an usual way, then a way of necessity will pass." Sheppard's Touchstone, 89.

"I say nothing of what is a way of necessity," said Mansfield, C. J., "I know not how it has been expounded, but it would not be a great stretch to call that a necessary way, without which the most convenient and reasonable mode of enjoying the premises could not be had." *Morris v. Edgington*, 3 Taunt. at p. 31.

Judgment. In *Barlow v. Rhodes*, 3 Tyr. 280, Bayley, B., said, at p. 287, Armour, C. J. that "the way" there in dispute, "was not essential to the enjoyment of the defendant's premises, and therefore could not pass to him without apt words."

In *Hinchliffe v. Kinnoul*, 5 Bing. N. C. 1, the Court held that under the description contained in the lease the coal shoot and the several pipes passed to the lessee as a constituent part of the messuage or dwelling-house itself, and as there was over an adjoining tenement of the lessor a passage by which this coal shoot and the pipes could, be approached, and the jury found that the passing and repassing over this passage was not merely convenient but necessary for the use of the coal shoot and of the pipes and of the repairing and amending the same and the side or wall of the house, the Court held that the right of passing and repassing to and from this coal shoot and pipes passed to the lessees as incidental to the enjoyment of that which was the clear and manifest subject matter of the demise.

In *Pheysey v. Vicary*, 16 M. & W. 484, no judgment was given, but in the course of the argument Parke, B., said: "Is the way contended for by the plaintiffs to be construed as of absolute necessity for access to property in its strict sense, as in the older cases, or as necessary to the convenient enjoyment of his dwelling-house, with reference to its condition at the time the testator had the user of it, as put in *Morris v. Edgington*, by Sir James Mansfield, who says, 'It would not be a great stretch to call that a necessary way, without which the most convenient and reasonable mode of enjoying the premises could not be had. One or other of the ways there in question was essential to the use of the house, and the Court ruled that the most convenient of them was that way of necessity to which the party was entitled. That decision is confirmed in *Barlow v. Rhodes*, which shews that the way asserted in *Morris v. Edgington* might be so claimed as a way of necessity.'" And Alderson, B., said: "Had this been not a dwelling house, but a field used for tillage, the way which would

pass must be such as would enable the owner to use the field in every possible way, *e.g.*, to get waggons, &c. in-^{Judgment.} Armour, C.J. Thus, in this case of a dwelling-house, must not the way be such as would enable him to get conveniently to every part of it?" * * " There may be a question whether, instead of ordering the entry of a verdict for the defendant, or of a non-suit, according to the leave given at the trial, we should grant a new trial, to try whether the way claimed was necessary to the convenient occupation of the plaintiff's house."

In *Glave v. Harding*, 27 L. J. Exch. 286, Pollock, C.B., said: "It cannot be denied that if a man builds a house, and there is actually a way used, or obviously and manifestly intended to be used, by the occupiers of the house, the mere lease of the house would carry with it the right to use the way, as forming part of its construction. * * My learned brethren undoubtedly do not entertain quite the same view on that subject, as to the mode of acquiring a right of way under such circumstances." And Bramwell, B. said, "With regard to the right of way, I desire to say, that although, if in my opinion it was necessary to resort to the ground taken by the Lord Chief Baron, I should agree with him upon it, the ground of my decision is different, and it is this: the plaintiff's title was derived from the lease, and unless the lease granted the right of way it did not exist. It did not grant the right in terms, and the only way in which it could grant it was, that the condition of the premises at the time when the lease was granted shewed that it was intended that the right of way should be exercised upon the principle of law I have adverted to, that by the devolution of the tenements originally held in one ownership, a right of way to a particular door or gate would, as an apparent and continuous easement, pass to the owners and occupiers of both of them. But I think that the way in question was not a continuous and apparent easement within that principle of law; and, therefore, I arrive at the conclusion that there was no evidence of the right of way alleged in this case.

Judgment. I found my opinion upon the condition of the premises at Armour, C.J. the time the lease was granted, there being then only excavations for foundations, with openings which were wholly of an uncertain character, and would have been equally appropriate for a door, a window, or any other of the purposes to which such an opening might possibly be applied. The plaintiff's claim to the right of way depending upon the lease, and the position of the premises at the time it was granted, no question of intention can enter into the decision. The right is not granted in terms, nor by implication, as a continuous and apparent easement; therefore it was not granted at all, and there was no evidence of it."

In *Worthington v. Gimson*, 2 El. & El. 618, Wightman, J., said: "The principle of that case (*Pyer v. Carter*, 1 H. & N. 916) would have been applicable to the present, had there been any proof that the way now in dispute was a way of necessity. But such proof is wholly wanting." And Crompton, J., said: "It is said that this way passed, as being an apparent and continuous easement. There may be a class of easements of that kind, such as the use of drains or sewers, the right to which must pass, when the property is severed, as part of the necessary enjoyment of the severed property. But this way is not such an easement."

In *Pearson v. Spencer*, 1 B. & S. 571, the Court said: "We do not think that, on a severance of two tenements, any right to use ways, which during the unity of possession have been used and enjoyed in fact, passes to the owner of the dissevered tenement, unless there be something in the conveyance to shew an intention to create the right to use these ways *de novo*. We agree with what is said in *Worthington v. Gimson*, that in this respect there is a distinction between continuous easements, such as drains, &c., and discontinuous easements, such as a right of way."

The plaintiff in that case conceded that the defendant had a right to use the road until it came to Cod Bridge, but contended that when he reached that point where the

road was only separated from the defendant's farm by a ^{Judgment.} fence, the defendant ought to pass through the fence into ^{Armour, C.J.} his own field, and after that, to adopt the language of the plaintiff as a witness, the defendant was to "road himself." The jury found that the Fold Way, which was the name of the road after it passed Cod Bridge, was a convenient way, but that it was not a necessary way; meaning that the defendant could occupy his farm without using the road further than Cod Bridge.

The Court held that the defendant was entitled to the Fold Way, because he was entitled to a way of necessity, and that the ground on which a way of necessity was created was that a convenient way was impliedly granted as a necessary incident, and the Fold Way was such convenient way. The Court of Exchequer Chamber, 3 B. & S. 761, did not agree with this decision, although it affirmed the judgment. In delivering the judgment of that Court Erle, C. J., said: "We have been much struck with the argument of Mr. Mellish, in which he contended that, if this right of way were taken as a right of way of necessity simply, the way claimed by the defendant could not be maintained; because we are inclined to concur with him that a way of necessity, strictly so called, ends with the necessity for it, and the direction in which the plaintiff says the way ought to go would so end. But we sustain the judgment of the Court below on the construction and effect of James Pearson's will taken in connection with the mode in which the premises were enjoyed at the time of the will. The testator had a unity of possession of all this property; he intended to create two distinct farms with two distinct dwelling-houses, and to leave one to the plaintiff and the other to the party under whom the defendant claims. The way claimed by the defendant was the sole approach that was at that time used for the house and farm devised to him. Then the devise of the farm contained, under the circumstances, a devise of a way to it, and we think the way in question passed with that devise. It falls under that class of

Judgment. implied grants where there is no necessity for the right claimed, but where the tenement is so constructed as that parts of it involve a *necessary dependence*, in order to its enjoyment in the state it is in when devised, upon the adjoining tenement. There are rights which are implied, and we think that the farm devised to the party under whom the defendant claims could not be enjoyed without dependence on the plaintiff's land of a right of way over it in the customary manner."

In *Ewart v. Cochrane*, 4 Macq. 117, the Chancellor, Lord Campbell, said: "I consider the law of Scotland as well as the law of England to be, that when two properties are possessed by the same owner, and there has been a severance made of part from the other, anything which was used, and was necessary for the comfortable enjoyment of that part of the property which is granted, shall be considered to follow from the grant, if there are the usual words in the conveyance. I do not know whether the usual words are essentially necessary; but where there are the usual words I cannot doubt that that is the law. In the case of *Pyer v. Carter*, that is laid down as the law of England, which will apply to any drain or any other easement which is necessary for the enjoyment of the property.

* * * Then as the subjects of the grant were then possessed, the tanyard along with this gutter to the hole was so enjoyed, and it was necessary for the reasonable enjoyment of the property. When I say it was necessary, I do not mean that it was so essentially necessary that the property could have no value whatever without this easement, but I mean that it was necessary for the convenient and comfortable enjoyment as it existed before the time of the grant. Then that being so, it seems to me that this easement passed by the conveyance." And Lord Chelmsford said: "I agree with him (the Lord Chancellor) also in thinking that the right of the pursuers cannot be placed either upon the natural right or upon the *res ipsi et facti*, but that it must arise from an implied grant; and the implication of grant must result from the evidence

in the case shewing the use and enjoyment of this drain is necessary to the enjoyment of the tanyard * * The question arises whether by the conveyance to Drynan in 1819 he did not impliedly convey to him that drain, the use and enjoyment of which, by the act of the parties themselves, had been shewn to be necessary to the enjoyment of the tanyard. I can come to no other conclusion than that it was essential to the enjoyment of the tanyard and therefore that we must imply a grant to Drynan when the tanyard was conveyed to him in 1819.”

Judgment.
 Armour, C.J.

In *Polden v. Bastard*, L. R. 1 Q. B. 156, Erle, C. J., in giving the judgment of the Exchequer Chamber said: “There is a distinction between easements, such as a right of way or easements used from time to time, and easements of necessity or continuous easements. The cases recognize this distinction, and it is clear law that, upon a severance of tenements, easements used as of necessity, or in their nature continuous, will pass by implication of law without any words of grant; but with regard to easements which are used from time to time only, they do not pass, unless the owner, by appropriate language, shews an intention that they should pass.”

I do not understand that the Chief Justice intended by this language to decide that no right of way would pass by implication of law without any words of grant, for he had already decided the contrary in *Pearson v. Spencer* with respect to the right of way there in dispute.

In *Watts v. Kelson*, L. R. 6 Ch. 166, Mellish, L. J., said at p. 172: “I am not satisfied that if a man construct a paved road over one of his fields to his house, solely with a view to the convenient occupation of the house, a right to use that road would not pass if he sold the house separately from the field.”

See also the judgment of Bramwell, B., in *Langley v. Hammond*, L. R. 3 Exch. 161; and of Lush, J., in *Kay v. Oxley*, L. R. 10 Q. B. 360; *Barkshire v. Grubb*, 18 Ch. D. 616; and *Thomas v. Owen*, 20 Q. B. D. 225.

In *Bayley v. Great Western R. W. Co.*, 26 Ch. D. 434,

Judgment. Bowen, L. J., said: "In considering this conveyance in reference to rights like rights of way, and I put aside apparent easements for the moment, the cases fall into two classes—first of all, cases where rights of way arise by simple implication, and, secondly, where they arise owing to the express words of the conveyance. In the first class of cases, namely, cases of implication, it may be assumed, for the moment, that there are no words which indicate an intention of the grantor about the right of way, but we are left to gather it from the fact that he has made a grant of premises to which this right of way is, or is supposed to be, annexed. The rule about rights of way which arise from implication is simply this, that on a severance of two properties, anything like a right of way, or any other easement which is used, and which is reasonably necessary for the reasonable and comfortable use of the part granted, is intended to be granted too. The principle is that the grantor is assumed to have intended that his grant shall be effectual. When two properties are severed the parties to the severance, both the man who gives and the man who takes, intend that such reasonable incidents shall go with the thing granted as to enable the person who takes it to enjoy it in a proper and substantial way. This particular case is not a case of a way of necessity, though I do not say there might not be ways which would pass by implication as ways of necessity, even if they were only reasonably necessary and not physically necessary."

See also the judgment of Chitty, J., in the same case.

The decision in *Polden v. Bastard* is, moreover, modified and controlled by the subsequent decision of the Court of Appeal in *Wheeldon v. Burrows*, 12 Ch. D. 31, in which Thesiger, L.J., in delivering the judgment of the Court, said: "We have had a considerable number of cases cited to us, and out of them I think that two propositions may be stated as what I may call the general rules governing cases of this kind. The first of these rules is, that on the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the

grantee all those continuous and apparent easements (by ^{Judgment.} which, of course, I mean *quasi* easements) or, in other words, ^{Armour, C. J.} all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owners of the entirety for the benefit of the part granted. The second proposition is that, if the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant." After referring to and discussing several cases, he further said: "These cases in no way support the proposition for which the appellant in this case contends; but, on the contrary, support the propositions that in the case of a grant you may imply a grant of such continuous and apparent easements or such easements as are necessary to the reasonable enjoyment of the property conveyed, and have in fact been enjoyed during the unity of ownership, but that, with the exception which I have referred to of easements of necessity, you cannot imply a similar reservation in favour of the grantor of land."

The first rule set out in this case includes such a right of way as the one in dispute in this case, and this was so held by the Court of Appeal in *Ford v. Metropolitan and District Railway Companies*, 17 Q. B. D. 12, which was an appeal from the judgment of Day, J., in favour of the plaintiffs in an action upon an award made under the Lands Clauses Consolidation Act, 1845, and Railway Clauses Consolidation Act, 1845.

The plaintiffs occupied under a lease to them for seven years, from 25th March, 1880, three back rooms on the first floor of a house and premises, No. 73 Great Tower street, London. No right of way was demised with the rooms, but the mode of exit was by going downstairs to a passage on the ground floor, and from thence through the front hall or vestibule of the house into Great Tower street. The defendants, the railway companies, in execution of the works authorized by their Acts of Parliament, pulled down and took away the front part of the house, including such hall or vestibule. The plaintiffs claimed compensa-

Judgment. tion in respect of the defendants having so pulled down
Armour, C.J. such part of the house, and interfered with the plaintiffs' right of way and other easements, and having rendered their three rooms unfit for the purposes of occupation and of the business carried on there by the plaintiffs.

It was contended that the plaintiffs had only a way of necessity through the hall, the right to which ceased as soon as the necessity for it ceased; that their landlords could have done what the defendants did without being liable to an action; that the plaintiffs had no right to have such hall kept for them; that they had only the right to go across the hall; and their landlords had a right to interfere with the hall as they pleased so long as sufficient space in it was left to enable the plaintiffs to get through it to the passage which led to the staircase to the plaintiffs' rooms.

Cotton, L.J., said: "I do not consider that any part of the property of which the plaintiffs had a lease was taken away, but some property to which they had a substantial right granted to them by the owners and landlords of the houses, namely, a right of going through the passage, being a matter connected with the use and enjoyment of those three rooms, was interfered with."

And Bowen, L.J., said: "What right of access had the claimants through the hall in its original state, and what title had they to complain if the hall, through which they passed, was so altered as to change the physical character of the access? Now, it seems to me, that the access to the demised premises falls distinctly within the class of rights alluded to in *Wheeldon v. Burrows*. By the grant of part of a tenement it is now well known there will pass to the grantee all those continuous and apparent easements over the other part of the tenement which are necessary to the enjoyment of the part granted, and have been hitherto used therewith. It was said that this mode of access was a way of necessity. That appears to me to be an imperfect statement of its character. A right of way of necessity is a right which arises by implication, but its true nature, and the distinctions which obtain between the

present right of access claimed and a right of way of necessity is explained in *Pearson v. Spencer*. The present right, using the language of Lord Chief Justice Erle, falls under that class of implied grants 'where there is no necessity for the right claimed, but where the tenement is so constructed as that parts of it involve a necessary dependence, in order to its enjoyment in the state it is in when devised, upon the adjoining tenement.' It was therefore a private right which the occupiers of those rooms were by law entitled to make use of in connection with their property."

I refer also to the case of *Brown v. Alabaster*, 37 Ch. D. 490, as a case very much in point, being the case of the severance of two properties previously held in entirety.

Brett v. Clowser, 5 C. P. D. 376, was referred to in the argument, but the facts in that case have no relation to the circumstances of this case.

The authorities to which I have referred, in my opinion, amply support the proposition with which I set out, that, upon the severance of a tenement by devise into several parts, not only do rights of way of strict necessity pass, but also rights of way necessary for the reasonable enjoyment of the parts devised, and which had been and were up to the time of the devise used by the owner of the entirety for the benefit of such parts; and so I am of opinion that the devise by Mrs. Bell to Mrs. Semmens of the forty-one feet carried with it by implication the right of way in question.

The motion must, therefore, be dismissed with costs.

[CHANCERY DIVISION.]

STOTHART V. HILLIARD ET AL.

Water and watercourses—Easement—Prescriptive rights—Dominant and servient tenements—Lease of servient tenement—Unity of possession—Suspension of easement—Joint owners of mill dam—Injunction—Damages.

One of two joint owners of a mill dam, each having a mill on the opposite sides of the river by which the dam was formed, was entitled to a prescriptive right to the supply of water as furnished by the dam all the way across the river and to dam back the water on to the plaintiff's land, but the other owner was not.

In an action to restrain both owners from backing the water to the detriment of the plaintiff :—

Held, that the dam as a piece of property was an entire thing and that the plaintiff was not entitled to an injunction restraining the use of the water, his remedy being in damages against the owner not entitled to the easement.

A right to an easement previously enjoyed cannot be acquired by the lapse of time during which the owner of the dominant tenement has a lease of the land over which the right would extend. During such unity of possession the running of the Statute of Limitations is suspended.

Statement.

ACTION for an injunction to restrain joint owners of a mill dam from damming back the water against the plaintiff's land, and for damages.

The defendant Hilliard was the owner of mills on the west bank of the river Otonabee, at the town of Peterborough, and the defendants the Auburn Woollen Company were the owners of mills on the east bank of the river. The plaintiff's land was situated on the west bank of the river above the defendant Hilliard's mills.

In 1833 a wing dam was erected for the purpose of supplying with water the mills on the west side. This dam raised the water against the plaintiff's land (which was then unpatented) to the same height as the present dam. In 1836 the rectory of Peterborough was created and included the plaintiff's land. In 1838 the old wing dam was replaced by a dam somewhat lower down the stream. This dam was washed away about 1860 and was succeeded by the dam complained of. In 1848 one Benson, the then owner of the mills on the west side of the

river, obtained from the then rector a lease for twenty years of the strip of land running along the water's edge, in respect of which damages were now claimed. In 1866 the defendant Hilliard obtained from the then rector a lease of said strip of land for twenty-one years. This lease expired in 1887, and this action was commenced in December, 1889. Statement.

The defendant Hilliard pleaded a prescriptive right to an easement under R. S. O. ch. 111; that his co-defendants on the other side of the river had a right to back the water in the manner complained of, and that it was not in his power to take down the dam; that the first and subsequent dams had been built before the eyes of the owners of plaintiff's land, who stood by and encouraged the defendants to build large and extensive mills; that the plaintiff's lands were greatly increased in value thereby. The defendant Hilliard further pleaded not guilty by statute, R. S. O. ch. 118, secs. 15, 16.

The defendants the Auburn Woollen Company relied on the Real Property Limitation Act and pleaded twenty and forty years' exercise of the easement as of right.

The plaintiff replied that by reason of the leases to Benson and Hilliard no easement could be acquired against the owners of the land.

The action was tried at the Chancery Sittings at Peterborough on 1st June, 1890, before BOYD, C.

Moss, Q.C., and *R. E. Wood*, for the plaintiff. The right to use the dam was conferred by the leases. Sec. 41 of R. S. O. ch. 111 makes provision for disabilities. When property is under lease no right can be acquired against the owners. Acquisition of right by prescription is founded on presumption of grant. There can be no prescription when there is no person capable of making a grant. The defendants the Auburn Woollen Company have not proved that they are joint owners of the dam with the defendant Hilliard, and the presumption is that they claim under him.

Argument.

They referred to *Winship v. Hudspeth*, 10 Ex. 5; *Bright v. Walker*, 1 C. M. & R. 211; *Outram v. Maude*, 17 Ch. D. 391; *Harbidge v. Warwick*, 3 Ex. 552; *Ladyman v. Grave*, L. R. 6 Ch. 763.

D. W. Dumble and *C. J. Leonard*, for the defendant Hilliard, contended that the plaintiff was estopped from claiming damages, as he had stood by and encouraged, for many years, the expenditure of large sums of money in the erection of the mills and dams which had produced the result he now complained of; and that, as a matter of fact, his property was largely increased in value thereby; that the defendants the Auburn Woollen Company had a right to maintain the dam in its present condition; and that the defendant Hilliard could not take down the same, or his half thereof, the dam being an entire thing.

Wallace Nesbitt and *R. M. Dennistoun*, for the Auburn Woollen Company, argued that the leases to the defendant Hilliard and his predecessors in title could not prejudice the Auburn Woollen Company, who were not privies thereto; that there was evidence of uninterrupted exercise of the easement as of right for twenty and forty years respectively; that a portion of the dam being situate on the land of the Auburn Woollen Company, the presumption was that they were joint owners of the dam with the defendant Hilliard, and that the onus of proving the contrary lay on the plaintiff.

They referred to *Winship v. Hudspeth*, 10 Ex. 5; *Magdalen Hospital v. Knotts*, 4 App. Cas. 324.

Moss, Q. C., in reply, referred to *O'Hare v. McCormick*, 30 U. C. R. 567.

June 6, 1890. BOYD, C.:—

While there is much subtle and difficult law involved in the details as argued, there appears to be one reasonably clear ground which will suffice to dispose of the case. This though not presented on the pleadings is yet involved in the undisputed facts brought out at the trial.

The convenient starting point is the date of the patent of the land now owned by the plaintiff—which is the alleged servient tenement—that is, 16th January, 1836.

Judgment.

Boyd, C.

Any user of the land before this by the construction of the wing dam and penning back water thereby is not material, because there was unity of title as to the land on which the dam was built, and the land affected thereby, so that no easement as such existed.

After patent the first dam erected on the land now owned by Hilliard, the defendant, (claimed to be the dominant tenement) was in 1838. That has been continued ever since, with slight and immaterial intermissions, to the present, and has had the effect of damming back water on the plaintiff's land, to some extent.

It does not seem to be of much importance whether the Otonabee at the place in question is a navigable or non-navigable stream—but the point of its being a navigable stream is not pleaded, and, as the matter may be one of nicety, I did not take all the evidence offered on this head, because this issue was not on the record.

Now the land was patented as lot 17 in con. 2, broken front, and upon the evidence it is a lot which is bounded by the river. That would carry the lot to the edge of the stream or to the mid-thread of the stream in its natural state and flow. But the dam maintained by the defendants has had the effect of deepening the water in front of the plaintiff's land, and so necessarily to raise it higher along the water's edge, to his appreciable detriment.

The land was patented as glebe land appurtenant to the rectory at Peterborough, and the title vested in the rector and his successors as a corporation sole, with the usual qualifications attaching to such ecclesiastical property by the English law. Thus as to title it remained till 1863, when was passed the Act 27 Vic. ch. 87, empowering the fee simple of this rectory land to be sold.

Now, assuming the enjoyment of a servitude by the land of the defendant against this glebe, it would not import a prescriptive right against the fee simple, and according to

Judgment.

Boyd, C.

the decisions could not affect more than the particular incumbent for the time being. In other words, as laid down in *Hill v. McKinnon*, 16 U. C. R. at p. 218, each incumbent was only entitled to hold during his incumbency, and could not alienate the fee, however he might affect his own rights by his laches or acquiescence in the servitude. His successor was not thereby affected or prejudiced. And as all prescription as its underlying principle implies a grant, it follows that the enjoyment up to 1863 cannot have any foundation in a grant, because an actual grant of the easement in perpetuity or in fee would have been invalid.

On the Peterborough side of the river mills were erected and using the water from the dam as early as its erection; on the other side of the river the first mill was put up in 1842—but both are in the same plight as to this easement up to 1863; so that a line may be drawn at this date prior to which no such prescription as now claimed had arisen, or could arise.

As to the defendant Hilliard, the next fact is that he, being owner of the land on which the dam is built, became in 1866 lessee for twenty-one years of the land now owned by the plaintiff. That lease was current till November, 1887, and as a consequence between these two dates (*i.e.* from 1866 till 1887) there was such unity of possession in both dominant and servient tenements as caused a suspension of the easement: *Ladyman v. Grave*, L. R. 6 Ch. 763.

Upon the facts, then, Hilliard had enjoyed this easement, *quâ* easement affecting the fee of the plaintiff's land, for three years, from 1863 to 1866, and again for two years, from 1887 to 1889, when (in December) this action was begun.

The plaintiff purchased the glebe lot in 1875, but could not get possession till the lease to the defendant Hilliard had terminated, and then he brings his action some two years after. His right appears to be established as against Hilliard.

But the defendants the Auburn Company are not affected by their co-defendant's unity of possession, and

as to them the easement has been enjoyed as of right continuously and uninterruptedly for the next twenty years before action, and indeed actually from 1842.

Judgment.

Boyd, C.

The better opinion appears to be that if the user be begun adversely to the owner of the servient estate, no interruption will arise because subsequently a lease is made of the servient tenement, provided the enjoyment be continued: Washburn's Easements, p. 179, sec. 65, 4th ed.; Goddard on Easements, Bennett's ed., p. 114; Gale on Easements, p. 200, 5th ed.

Upon the evidence I think the right deduction is that the defendants are all joint owners—tenants in common—of the dam, as they are and have been jointly interested in its maintenance and use. As a piece of property the dam is an entire thing, and I do not see that the half on the Peterborough side should be taken down and the other half allowed to remain.

The Auburn Company and those from whom they claim have been in the actual enjoyment of the water in a particular way by means of this dam since 1842, and this establishes a right so to use the water. Therefore it appears to me that to interfere with this dam would give the defendants the Auburn Company less than they have a right to, which is the supply of water as furnished by the existing dam all the way across the river.

Compensation may be made in damages to the plaintiff for the injury he sustains from the action of Hilliard, which cannot be very serious, as it involves no more than securing him in working the quarry, which is of questionable value. This may be arrived at by many comparatively inexpensive devices for keeping out the water.

This result, upon the merits also, I consider more desirable than to interfere with the vast expenditure of money in improvements which has taken place on the river on the faith of this dam being a legal construction to utilize the waters of the Otonabee.

The plaintiff is forty-six years of age, and has been all along since he can remember cognizant of the developement

Judgment. and use of the river at this point, and I was but faintly
Boyd, C. impressed with the merits of his claim at the trial.

As to the Auburn Company, the action is dismissed with costs.

As to Hilliard, judgment is for the plaintiff to recover damages to be ascertained by the Master with costs of action. I am willing to hear the parties, fixing each a sum for damages in order to assist in determining how the costs of the reference should be disposed of.

G. A. B.

[CHANCERY DIVISION.]

WELLBANKS V. HENEY.

Fraudulent preference—Agreement to supply material for manufacture, the goods manufactured nevertheless to remain the property of the supplier of the material—Defeating and delaying creditors.

It appeared on the trial of an interpleader issue, that the claimant had agreed in writing with the execution debtor, an insolvent, to furnish material to the latter for the manufacture of carriages, from time to time, for one year, it being provided that no property in such goods should pass, but that notwithstanding any improvement or work upon the same, or change of form or addition thereto or use thereof, the same and every part thereof should be and remain the goods and property of the claimant.

The material was supplied and manufactured into carriages by the execution debtor, which were seized by the defendants, execution creditors of his, and the claimant claimed the same, more being owing to him for the material supplied than the value of the goods seized :—

Held, reversing the decision of Armour, C. J., that the above agreement was not one which could be said necessarily to have the effect of defeating or delaying creditors, and in the absence of fraud the claimant was entitled to succeed on the issue :—

Held, also, reversing the decision of Armour, C.J., that the fact that the claimant, thinking that the above agreement was lost, from time to time took mortgages from the execution debtor upon the carriages manufactured by him, made no difference ; for even if this had the effect of vesting the property therein in him that could only be subject to the lien of the claimant to be paid out of them. Moreover the mortgages having been taken, not to supersede the original writing, but under the error that that being lost (as supposed) would be no longer available, the rights of the parties were still subject to the original agreement.

THIS was an interpleader issue wherein Hiram Wellbanks *Statement*. affirmed and Heney and Lacroix denied that certain goods and chattels, to wit : five top buggies, one surrey, and one cutter, on March 10th, 1890, seized in execution by the sheriff of the county of Prince Edward under a writ of *fi. fa.* tested September 15th, 1886, issued upon a judgment recovered by Heney and Lacroix in an action against Frederick W. Adams were, or some part thereof was, at the time of said seizure, the property of the said Hiram Wellbanks as against Heney and Lacroix.

The facts of the case are sufficiently set forth in the judgment of Ferguson, J. It is desirable, however, to set out verbatim the material provisions of the agreement of September 22nd, 1888, therein referred to. This agree-

Statement. ment was made between Hiram Wellbanks, of the first part, and Frederick W. Adams, of the second part, and proceeded as follows :—

“Whereas said party of the first part is a hardware merchant carrying on said business at said town of Picton, and the party of the second part is desirous of procuring from said party of the first part materials to be used in the construction and making of carriages and vehicles of different kinds from time to time as he may require same within one year from the date of these presents.

And whereas the said party of the first part has agreed to supply and furnish such of said materials as he has in stock or may obtain for such purposes, to said party of second part, to the extent of not more than \$500 as the same may be required from time to time during said term, upon the execution and delivery of these presents, the several agreements and conditions whereof are well and truly to be observed and performed.

Now, therefore, this agreement witnesseth that the said party of the first part shall supply and furnish for the use of the party of the second part, in the construction of said carriages and vehicles from time to time during said term, the said goods and materials as the same may be required and ordered by the said party of the second part at the regular retail prices of the same respectively *

But and it is hereby witnessed that no property, title, interest or ownership in or to the said goods or merchandise or any of them shall pass to, vest in, or belong to said party of second part, but that notwithstanding any act of delivery or retaining possession of the same or any part thereof by said party of second part, and notwithstanding any improvement or work upon same or change of form or addition thereto or use thereof, the same and every part thereof shall be and remain the goods and property of said party of the first part.

* * * * * *

In case the party of the first part shall consent to a sale of any of the said goods or carriages, the price thereof or the securities to be taken therefor shall be paid and transferred forthwith to the party of the first part, to the extent of the amount then due and owing to said party of the first part on account of said goods and merchandise theretofore supplied to the party of the second part, and the property, title, and ownership of said carriages and vehicles, both during construction and at and after completion shall be and remain in said party of the first part.

Provision that if party of second part removes or parts with possession of the said goods and carriages contrary to the terms of this agreement party of first part may forthwith seize and remove all said goods and carriages, and for that purpose enter into any premises where they may be found.

Provision that party of first part may at any time that he shall deem such action necessary and proper for his protection take possession of said goods and carriages and remove the same, accounting to the party of the

second part for his disposal thereof as occasion may require, and the rights Statement of said parties respectively demand."

In witness whereof, etc.

The issue came on for trial on April 22nd, 1890, before ARMOUR, C. J., at Picton, who subsequently delivered judgment upon it as follows :—

ARMOUR, C. J.—I find that Frederick W. Adams became insolvent in the year 1886, to the knowledge of the plaintiff, and has ever since continued to be, and still is insolvent to such knowledge. I am of opinion that the bargain made between the plaintiff and the said Frederick W. Adams, and evidenced by the instrument of the 22nd day of September, 1888, had the necessary effect of delaying and defeating creditors, and that this appears from its very terms, and that it was therefore void as against creditors. The effect of it was to enable the said Frederick W. Adams to get the benefit of the profits he derived from turning the materials supplied to him by the plaintiff into carriages, and preventing his creditors from obtaining the benefit of such profit. If such an agreement were to be held valid as against creditors, any debtor desirous of so doing, and having a friend willing to supply him, might go on for years making money and living in style and setting his creditors at defiance. I think that the defendants are entitled to succeed upon this ground; but I also think that they are entitled to succeed upon another ground. The goods supplied by the plaintiff to Adams, were delivered to Adams, and the price thereof charged to Adams by the plaintiff in his books; all that was necessary for the plaintiff to do, therefore, to make the goods the goods of Adams was to exercise his intention to that effect. The plaintiff thinking, as he said, that the instrument of the 22nd of September, 1888, was lost, from time to time took mortgages from Adams upon the carriages manufactured by him from the materials supplied to him by the plaintiff, and the taking of these mortgages was evidence that the plaintiff had, before taking them, exercised the intention that the

Judgment
Armour, C.J. goods mortgaged should become the property of Adams, and that the property in them had passed to Adams before Adams mortgaged them to the plaintiff, and the defendants' execution being in the sheriff's hands all the time from 1886, attached upon the goods the moment the property in them passed to Adams and before mortgages could or did attach.

In my opinion, therefore, the verdict and judgment must be entered for the defendants with the costs of the interpleader proceedings if I have the disposal of such costs.

The plaintiff now moved before the Divisional Court by way of appeal from the judgment, and the motion was argued on June 14th, 1890, before BOYD, C., and FERGUSON, J.

C. H. Widdifield, for the plaintiff. The Chief Justice thought that the taking of the chattel mortgage was evidence of an intention that the goods should pass to Adams. It does not appear under the circumstances that this was so. It is shewn that he lost the agreement and thought that he would lose his goods thereby, and that was why he took the mortgage. Under all the cases the judgment should not be sustained on that ground. The agreement does not come within the Chattel Mortgage Act: *Banks v. Robinson*, 15 O. R. 618. The transaction was *bonâ fide* on behalf of the plaintiff. The property never would have existence but for the agreement. *Banks v. Robinson* turns on the point that the goods never vested in the debtors. There was no misleading of creditors in this case. The evidence shews that the plaintiff furnished everything to Adams. Adams put in nothing but work. *Macaulay v. Morshall*, 20 U. C. R. 273, is almost exactly in point.

Alcorn, Q. C., for the defendants. The sole question is whether Adams had property in the goods. We rely on the judgment of Armour, C. J. [BOYD, C.—If the property did not pass to Adams, there is nothing for the execution to work upon.] But I argue that the agreement cannot

be supported. It was a case of ordinary sale on credit, and the property passed. The taking and the registration of the chattel mortgage shews this. There is no discrimination in the agreement between materials and labour. The agreement is that the whole completed vehicle shall be the plaintiffs. The Chief Justice finds notice to plaintiff of insolvency of Adams from 1886 to the present time, and therefore this case is not within *Johnson v. Hope*, 17 A.R. 10, or *Lamb v. Young*, 19 O.R. 104. Argument.

Widdifield, in reply. This agreement was made not to protect the debtor's property, but the plaintiff's own property.

June 30th, 1890. FERGUSON, J.:—

This is an interpleader issue in which the claimant of the goods is the plaintiff, and the execution creditors are the defendants. The goods are several buggies, a surrey, and a cutter. These are claimed by the claimant under an agreement with Adams, the execution debtor, dated the 22nd day of September, 1888, which is filed and marked Ex. A. It provided that the plaintiff, a hardware merchant, should furnish materials to Adams for the manufacture of articles of this character for the use of Adams in the construction of such articles from time to time for the period of one year, and to the extent of \$500. It also provided that no property, title, interest or ownership in such goods or merchandise should pass to, vest in, or belong to Adams, but that notwithstanding any improvement or work upon the same, or change of form, or addition thereto, or use thereof, the same and any part thereof should be and remain the goods and property of this plaintiff. There are many other provisions of the agreement, but I do not see the necessity of setting them forth here.

The material was supplied under the agreement, and worked up, or manufactured by Adams. The goods in question are some of the productions.

The writs of the defendants (execution creditors of

Judgment.
Ferguson, J.

Adams), had been and were continuously in the hands of the sheriff from the year 1886. Before this agreement of September, 1888, the plaintiff and Adams had been dealing under a verbal agreement, which, so far as known, was of a character somewhat similar to this written one, but at this period the plaintiff became dissatisfied, and said to Adams that he must have a writing or something to this effect. A chattel mortgage, as to which there is now no dispute or difficulty, was given respecting what was past, and this agreement entered into for the one year then in the future.

The goods in question have been sold by the sheriff and the proceeds amount to \$398.00. The amount of the present claim of the plaintiff in respect of goods provided or furnished Adams under the agreement is said to be \$450, or thereabouts, and it is said that there are some notes in the hands of the plaintiff amounting to some \$250, the position of which does not appear to be very clear, but looking at the terms of the agreement one would infer not unreasonably, I think, that these are notes given for manufactured articles sold, which have not yet been paid or satisfied and for anything that is known may not be.

At one time under the supposition that this written agreement had been lost a chattel mortgage was made in favour of the plaintiff. He does not now however claim anything under or by virtue of this mortgage, the agreement having been found.

It was said that the agreement was eventually found in the custody of Adams, and it was contended that its being lost or mislaid was only a pretence, and that this making of the chattel mortgage for that reason should be considered in the same light as the making and accepting of such a document under ordinary circumstances, and further that the effect was to defeat any right the plaintiff had upon the agreement. All I desire to say upon this immediate subject is that the evidence shews that this was the reason why this chattel mortgage was made, and the act

and the reason for doing it do not appear to me unreasonable under the circumstances. The plaintiff wanted some writing to be able to shew manifesting his right or supposed rights in the matter. This was the reason for his getting this agreement in September, 1888. This being lost, the paper it was thought proper to get was this mortgage. Upon the agreement being found the plaintiff might I think rest upon the agreement and not upon the mortgage, for if the agreement had not been lost or supposed to have been lost the mortgage would never have existed at all.

Judgment.
Ferguson, J.

The agreement is one I think that might lawfully be made. Fraud has not been found. I think that nothing of the kind should under the circumstances and on the facts disclosed be inferred.

The learned Judge was of the opinion that the agreement had necessarily the effect of hindering and delaying the creditors of Adams. I am unable to see that such was the necessary effect of it. Adams was in insolvent circumstances and unable to pay his debts in full, but I do not think this agreement was a sale, assignment, or transfer of goods or property within the meaning of the statute, which necessarily had the effect of hindering or delaying creditors.

If the goods had not been supplied by the plaintiff one would say looking at the evidence, that in all probability the property in question would never have existed at all. I am unable to arrive at the conclusion that this agreement should be held void as against creditors of Adams.

The question to be tried, or rather which was tried, is defined in *Black v. Drouillard*, 28 C. P. 107.

If by the agreement the goods were the property of the plaintiff the defendants' execution did not attach upon them. If owing to the manner of dealing with the property or the mode of dealing with it, the property in the goods is considered to have passed to Adams as was contended, this could only be subject

Judgment. to the plaintiff's claim and charge upon it, which claim
Ferguson, J. exceeds the value of the property, the amount of money arising upon the sale of it. Adams had not the right to sell or dispose of the property without paying or satisfying the plaintiff's claim, and it was only his right that could be seized under the defendant's executions, and this would seem to have been of no value.

It may be that there is still room for some cavil owing to the position of the notes before alluded to, but I do not see that the information afforded us is sufficiently certain or definite to enable us further to deal with the differences between the parties even if this could be done upon the trial of an issue, such as the present one is.

I am of the opinion that the judgment should be for the plaintiff in the issue with costs.

BOYD, C.:—

The Judge does not find *fraud*, nor is there any evidence to shew this, and it should not be inferred.

If the writing of September, 1888, governs, the property the sheriff seized did not pass to the debtor Adams, and the execution did not attach. The necessary effect of the agreement cannot be to defeat and delay creditors, because there were no seizable assets of Adams which would be in existence, but for this agreement to supply materials on the part of Wellbanks. If the dealing of the parties as indicated in one aspect of the case, by the finding of the learned Judge had the effect of vesting property in the carriages in the debtor Adams, that could only be subject to the lien and claim of Wellbanks to be paid out of them. This would fall under the well-established doctrine that the execution creditor can render exigible property seized only so far as the debtor has a beneficial interest therein. As between Wellbanks and Adams, the latter could not hold the carriages without satisfying the claim of Wellbanks for the price of the very things out of which the property seized was made.

Again, in the absence of fraud, I think that a fair explanation is given why the last mortgage was taken. It was not to supersede the original writing, but under the error that that being lost (as supposed) it would be no longer available. This being so, the rights of the parties were still subject to the original agreement which represents a manner of dealing that is legally permissible, although it is open to the observations which were made in *Banks v. Robinson*, 15 O. R. 618, as to desirability of making public bargains of this kind which may have the effect of misleading creditors.

Judgment.

Boyd, C.

I have dealt with the case as presented at the trial and on the argument before us. The debt of the plaintiff Wellbanks against Adams appears to be over \$700, the agreement of September, 1888, is to secure the plaintiff to the extent of \$500 only, but it is said that the goods seized herein being sold have realized \$398, so that there is not enough to answer the privileged claim. The evidence has not been so given as to enable us to discriminate more critically as to the rights of the parties in respect of the subject matter in this interpleader.

As the result I think the judgment should be entered for the plaintiff, with costs.

A. H. F. L.

[CHANCERY DIVISION.]

STRAUGHAN v. SMITH.

Seduction—Action by brother—Loss of service—Infant defendant—Non-appointment of guardian—Rules 261, 313.

IN an action for seduction it appeared that the plaintiff was the brother of the girl seduced; and that the girl, though in the service of another person, yet (by agreement with her mistress, entered into at the time of her engagement) was at liberty to perform, and did perform certain services at home for the plaintiff, under contract with him for which she received compensation:—

Held, that the plaintiff was entitled to maintain the action.

Rist v. Faux, 4 B. & S. 409, specially referred to; *Thompson v. Ross*, 5 H. & N. 16, distinguished.

It also appeared that the defendant was not quite of age, and that no guardian had ever been appointed, but that the fact of infancy was well-known to the defendant's parents and to the solicitor and counsel who appeared for him at the trial, and no objection on this ground was taken till this motion before the Divisional Court:—

Held, that under Rules 261 and 313, the appointment of a guardian was not imperative; the Court had a discretion; and in this case the judgment obtained against the defendant at the trial should not be interfered with.

Furnival v. Brooke, 49 L. T. N. S. 134, followed.

Statement

THIS was an action brought by one Robert Straughan against James Jack Smith, claiming \$1,000 damages, for the seduction of his sister, Elizabeth Straughan, whom he alleged in his statement of claim, before, and at the time and since the seduction, lived with him, the plaintiff, and worked for him as his servant.

The defendant denied the seduction, and that Elizabeth Straughan was the plaintiff's servant, and alleged that no relation of master and servant subsisted between the plaintiff and his sister at the times aforesaid.

The action came on for trial at the Hamilton Spring Assizes on March 10th, 1890, before FALCONBRIDGE, J.

The evidence shewed that at the time when the seduction took place Elizabeth Straughan was in the service of Mr. and Mrs. Smith, the parents of the defendant, but under an arrangement with them made at the time of the hiring by Mrs. Smith, she used to go to the house of the plaintiff and do household work for him under a contract

with him, the nature of which will be found referred to in Statement. the argument of counsel.

The defendant was an infant, but no guardian had been appointed in the action.

In the course of his charge to the jury the learned Judge, Falconbridge, J., made the following observations :

This is an action of seduction, one differing in its aspects from actions of the kind which are usually brought into Court. As a general rule, the action is brought by the father of the girl ; in this case the action is brought by the brother—the father and mother of the girl being dead, having been dead some years. The foundation in theory of the law of the action of seduction, even when brought by the father, is loss of service; the daughter is presumed to be the servant of the father ; and the action is brought as a rule by the father, for loss of service, although the damages are seldom if ever confined to the mere pecuniary loss suffered by the father. As the law stood for many years, the father had to prove some acts of service, however slight, in order to maintain his action ; but in the present state of the law, when the father brings action he is not obliged to prove any acts of service ; but the relation of master and servant is presumed by the law to exist. There is a further provision of the law, that where the father and mother are dead, or not able to bring the action, another person can bring the action, under the same circumstances as the action could have been brought by the father at common law. In other words, when it is brought as in this case, by the brother, there must be some evidence upon which to found the relation of master and servant. Now, you heard the discussion by the learned counsel, at the close of the plaintiff's case—and I have determined to leave it to you, ruling, for the purposes of this trial, that there is upon the evidence of the plaintiff, and of his sister, sufficient to justify me in finding that there were acts of service performed by the sister for the brother,—that, in other words, he is entitled to be considered as her master for the purposes of this action. The defence then rests upon two grounds—First, the defendant says that the sister was not in any sense the servant of the plaintiff ; and, secondly, he says he is not the father of the child. I do not know I can refer it to you, as regards the service, in any better way than I have done, by telling you if you accept the statements of the condition of affairs in the house, if you believed that she used to go there in the evenings—he says that as much as five nights in the week his sister came there—that she used to do acts of service, such as scrubbing, washing, cooking, mending, and other acts of service—it is said here in evidence that she did all this in pursuance of an arrangement made with Mrs. Smith at the time she hired ^o take the place of her sister who had had to return home sick ; it is said that such an arrangement was made, and no evidence is put before you to contradict that, by which she was to be at liberty to go there in the evenings. The girl said that when she made the arrangement with Mrs. Smith,—“ I told her I would have to go home to do work in the even-

Statement. ings ; that was the understanding." If you believe those statements ; if you accept those facts placed before you, uncontradicted as they are ; if you believe also that she did work upon the alternate Sunday evenings when she was at her brother's house ; if you believe the statements made here as to what she did,—then there is evidence upon which you will be justified, under my ruling as to the law, in finding that he was her master.

The jury brought in a verdict for the plaintiff, with \$500 damages.

The defendant now moved to set aside this verdict, and for a new trial ; and the motion came on for argument on June 23rd, 1890, before BOYD, C., and FERGUSON, J.

Bruce, Q.C., for the defendant. The defendant is an infant, and the action has proceeded without a guardian. Then there is the other question, viz., whether the plaintiff is entitled to maintain the action. We say the plaintiff is not entitled to maintain the action : *Fountain v. McSween*, 4 P. R. 240 ; *Macaulay v. Neville and Macaulay*, 5 P. R. 235 ; *Carr v. Cooper*, 1 B. & S. 230 ; Con. Rule, 260 ; *Hyne v. Burn*, 13 P. R. 17 ; *Simpson on Infants*, 2nd ed., p. 486 ; *Wade v. Keefe*, 22 L. R. Ir. 154 ; *Thompson v. Ross*, 5 H. & N. 16 ; *McKersie v. McLean*, 6 O. R. 428 ; *Manley v. Field*, 7 C. B. N. S. 96 ; *Jerry v. Hutchinson*, L. R. 3 Q. B. 599 ; *Postlethwaite v. Parkes*, 3 Burr. 1878 ; *Ogden v. Lancashire*, 15 W. R. 158 ; *Rist v. Faux*, 4 B. & S. 409.

Carscallen, Q.C., for the plaintiff. As to the infancy of the defendant, Rules 260, 261 do not in the case of personal tort require imperatively the appointment of a guardian. An infant is not as of course entitled to have proceedings set aside on the ground of infancy : *James v. Aswell*, 11 Jur. N. S. 562. The defendant should have raised the question at the trial. His infancy is a question of fact which the jury should have been called on to pronounce upon. An infant sued in tort or in contract is in the same position. In *Furnival v. Brooke*, 49 L. T. N. S. 134, the Court refused to set aside a judgment against an infant. The defendant was personally served, and appeared by solicitor. The plaintiff was entitled to assume that the defendant was of age. It was for the defendant to set up his

infancy. No point was made at the trial. There are no ^{Argument} merits. It is entirely within the discretion of the Court. [*Bruce*, Q. J. C., *Carr v. Cooper*, 1 B. & S. 220, shews that it was the duty of the plaintiff to apply to appoint a guardian when the fact of infancy came to his knowledge.] If the proceedings are set aside the Court should impose terms of payment of all costs. As to right of the plaintiff to maintain the action, the plaintiff is *in loco parentis* to his sister. It appears from the evidence that the plaintiff had assumed a liability for payment of the passage money of himself and his brother and sisters from England to Canada, and it was agreed that the plaintiff should take up house, and that his brother and sisters including the seduced girl should contribute by their wages to support the house and enable the plaintiff to pay the passage money. This sister also did cooking and work about the house for the plaintiff. At the time she was seduced the obligation subsisted. The plaintiff is not bound to prove any contract of hiring and service. In *Abernethy v. McPherson*, 26 C. P. 516, many of the cases referred to by counsel for the plaintiff are reviewed. There can be a divided service: *Rist v. Faux*, 4 B. & S. 409. The relationship of master and servant was constituted by this arrangement sufficiently to enable the plaintiff to maintain the action. I refer also to *Howard v. Crowther*, 8 M. & W. 601; *Harper v. Luffkin*, 7 B. & S. 387; *Harris v. Butler*, 2 M. & W. 539.

Bruce, in reply. If there are to be two masters, they both must join as plaintiffs. Rules 260 and 261 in our Consolidated Rules of Practice are new rules, and not the same as the English Rules.

June 30th, 1890, BOYD, C. :—

The evidence shews that at the time of living with Mrs. Smith it was stipulated and agreed that the girl should be at liberty to do service for her brother, which differs the case from *Thompson v. Ross*, 5 H. & N. 16, where the permission was occasional and at any time revocable.

Judgment. Here it was in effect a portion of time exempted from
Boyd, C. that to which Mrs. Smith was entitled, which was occupied with service rendered to the brother as head of the Straughan family. The services rendered to this brother were under contract with him for which she received compensation by means of a family arrangement detailed in the evidence. There seems to be as much evidence, and of the same kind as in *Rist v. Faux*, 4 B. & S. 409.

On the ground of infancy I am not disposed to interfere. We may follow *Furnival v. Brooke*, 49 L.T. N.S. 134, which shews that the Judges have a discretion whether or not to interfere in cases of infancy, according to circumstances. This is rested there partly upon the phraseology of the English orders, and ours, though different in form, are on this point identical. I refer to those numbered 261 and 313, in which "may" is used as in the order under consideration in *Furnival v. Brooke*. Such discretion, however would, apart from rules and orders, appear to be inherent in the Court: See *Wright v. Hunter*, 1 L. J. O. S. (K. B.) 248. There is no reason to believe, or indeed suspect that the interests of this infant were not carefully considered and protected. The solicitor who appeared and defended him, and the counsel who acted at the trial for him, and the parents with whom the girl seduced and the defendant resided, all knew of his infancy and did all that was deemed advisable to exculpate and exonerate him. No good purpose would be served by a *rechauffé* of this case before another jury. The judgment will therefore be affirmed with costs.

FERGUSON, J. :—

I do not see that the verdict should be disturbed on the alleged ground that the relationship of master and servant was not shewn.

The evidence shews that the understanding at the time of the hiring of the girl by Mrs. Smith, was that she was to go home at nights, and attend to the work there, and

there is evidence that the work to be done at home was Judgment.
done under a contract or agreement. With respect to Ferguson, J.
this immediate subject the case resembles more nearly the
case of *Rist v. Faux*, 4 B. & S. 409, than any other that I
have seen, and I think it clearly distinguishable from
Thompson v. Ross, 5 H. & N. 16, on the ground that in
that case the assistance given to the parent at the work by
which the parent earned a livelihood was by the permis-
sion of the master; whereas in the present case it was a
part of the understanding and agreement at the time of
the hiring with Mrs. Smith, that this work might be done
at home, and as against Mrs. Smith there was the right
to do it without permission.

Then as to the other ground, that of the infancy. The
case of *Furnival v. Brooke*, 49 L. T. N. S. 134, was an
appeal from the refusal at Chambers to set aside a judg-
ment obtained by the plaintiffs for default of appearance.
As in the present case the defendant was an infant, but
almost of age. The Rule then in force in England is
referred to in the judgment of the Court. The words in
that Rule were "may apply," and the Court held that they
were permissive, and that there was a discretion. The
learned Judges said that they had perfect discretion,
remarking that the word "must" was not used in the
Rule, and under the circumstances of the case refused to
exercise the discretion in relief of the infant defendant.
The words in our Rule 261 are: "there may be a guar-
dian appointed," &c. If it were not for the authority
of that case (*Furnival v. Brooke*), I should have in-
clined to the view that the position of a plaintiff in such
circumstances would be this: that he would be driven to
make the application or not further proceed with the
action. But assuming that the discretion existed under
the English Rule, one does not see any good reason why it
should not exist under our Rule. Then assuming that the
discretion does exist, this is surely a case in which it should
not be exercised in favour of the defendant, who is so
nearly of full age, and who has, no doubt, availed himself

Judgment. of all the advantages, in fact, of a full defence to the action.
 Ferguson, J. At least, these advantages have been made available for him, and the chances of a result in his favour have once been had. For these reasons I agree in the judgment of the Chancellor.

A. H. F. L.

[CHANCERY DIVISION.]

MORRIS V. MARTIN.

Chattel mortgage—Mortgage of goods to secure wife barring dower—Payment of money into Court—Chattel Mortgage Act—Interpleader—R. S. O. 1887, ch. 125, sec. 6.

A husband executed to his wife a chattel mortgage to secure her against loss by reason of her having barred her dower in certain mortgages of land. The goods were seized by his execution creditors, claimed by her, and sold pending interpleader proceedings. The husband was still living :—

Held, that the money, the proceeds of the goods, must remain in Court to abide further order, so that the wife could have the same security that she had by the mortgage ; and if she should not hereafter become entitled to the money, it would be available to the husband's creditors.

Held, also, that the chattel mortgage was valid, notwithstanding anything in R. S. O. 1887, ch. 125, sec. 6.

Statement. THIS was interpleader issue between A. W. Morris & Bro., and the Merchants' Bank of Canada affirming, and Jean Martin denying that certain goods and chattels claimed by Jean Martin, seized in execution by the sheriff of Kent under a writ of *fi. fa.* tested May 30th, 1889, and other subsequent writs, were at the time of seizure the property of A. W. Morris & Bro., and the Merchants Bank as against Jean Martin.

The defendant to the issue, Jean Martin, was the wife of one Colonel Martin, and claimed the goods under a chattel mortgage given to her for the purpose of securing her from any loss which she might sustain by reason of her having barred her dower in lands comprised in a mortgage given by her husband to F. B. Stewart, on November 17th, 1888, to secure him against liability in respect of certain

notes which he had endorsed for Colonel Martin. The ^{Statement.} circumstances of the case sufficiently appear from the judgments of STREET, J., and of FERGUSON, J. It may be added, however, that the mortgage of November 17th, 1888, was a second mortgage, Stewart holding a prior mortgage upon the same property in which Jean Martin had barred her dower.

The issue was tried at Chatham, on April 14th, 15th, and 16th, 1890, before STREET, J.

Douglas, Q. C., for the plaintiffs.

Christie, for the defendant.

April 16th, 1890. STREET, J. :—

I have had an opportunity of considering the matter thoroughly, and I do not see that I need call upon Mr. Christie in the view that I take of the matter. There is no doubt, I think, that Colonel Martin was really insolvent at the time he gave this mortgage to Mr. F. B. Stewart, on November 17th, 1888. He had a large amount of real estate, and also a large amount of personal estate, but he owed a large amount of money. The money was becoming due immediately, and therefore was a debt which had to be provided for immediately. The assets were assets which were not quickly realizable; so that if he had been called upon to pay his liabilities he was unable to do so. His only chance was to obtain renewals of the notes upon which he was liable to the Merchants' Bank; his other debts were not very considerable. I think he may readily have thought that if he obtained renewals of those promissory notes from the Merchants' Bank he would obtain time in that way to sell his lands, and so to raise funds in that way for the payment of all his debts.

So when he was pressed, as I think he was pressed, by Mr. Stewart, to give this mortgage, that appeared to be the only means of saving himself from immediate insolvency.

Judgment. In his view it was highly important that he should be able to obtain renewals of the notes. Mr. Stewart was very anxious, apparently, to get this mortgage. He pressed for it, and he evidently, because he did press for it, thought there was a margin in the property sufficient to secure him, or to secure him in a great measure for the renewals of these notes. That being the feeling of Colonel Martin and of Mr. Stewart, Colonel Martin brought his wife in to execute the security to Mr. Stewart; his wife had already executed a number of mortgages, and possibly fearing that her husband's difficulties were increasing, refused to execute the mortgage when she was asked to do so, and she went away and consulted a lawyer with regard to it. They all went away that day, she refusing to sign the mortgage. They came in another day; on that other day she asked her husband, before signing the mortgage, to pay her something for signing the mortgage; he said he had no money that he could apply in that way. Then it was suggested, and I think, from the evidence, by Mr. Christie, the solicitor who was acting for Colonel Martin and for Mr. Stewart, that her husband might give her a chattel mortgage, and that was ultimately agreed to. The chattel mortgage recites the agreement on her part to execute the mortgage of the land, barring her dower in it upon her getting a chattel mortgage upon these chattels, to secure her against any loss that she might sustain by reason of executing the mortgage of the real estate. As the real estate has turned out, it seems doubtful whether her dower at that time was worth anything. The highest estimate that has been put upon the surplus over the prior mortgages is \$2,000; and that I should think would be the outside, at all events, that would be realized over the mortgages which were in existence before that of November 17th, 1888; but at that time there was a reasonable expectation that a much more considerable sum would be realized out of the lands. Mr. Stewart seems to have been of that opinion; Colonel Martin I think undoubtedly was; and Mrs. Martin probably did not know very much about

it; but believed, because she was asked to join in the mortgage, that her dower was worth something. That belief on her part and on their parts would be perfectly good consideration for the giving to her of security against any loss that she might sustain by releasing what they seem to have all thought was a valuable property; that is to say, her dower in the equities of redemption.

Judgment.
Street, J.

I think that the arrangement that was come to was the one that was suggested by Mr. Christie and the one which was embodied in the chattel mortgage. The parties seem undoubtedly to be very confused about that. Colonel Martin says absolutely that the agreement was that his wife was to own all these chattels. Mrs. Martin says in the box, that she was to have security for her dower; and she says in the box also, that if she lost nothing by joining in the mortgage that the chattels would go back to her husband; but she has also said on other occasions, when she was examined before, that the chattels were to be hers. I think I may reasonably put all this down to the confusion between what was the agreement at the time and what appears to be the ultimate outcome of the agreement; that the ultimate outcome of the agreement appears to be that she will get nothing, that she will lose everything that she has conveyed, and that therefore the chattels will belong to her, as would undoubtedly be the result if she lost anything equal to the value of the chattels by reason of her having joined in the mortgage. However, that seems to me to be the only difficult point in her rights. I think she acted in perfect good faith in the matter, and that she only gave up her dower and signed the mortgage upon the terms that she was to get this chattel mortgage to secure her against loss.

Then it is urged that the amount of liability that she incurred is not stated in the chattel mortgage. (a) It was a case, I think, in which it was impossible to arrive at the amount of the liability that she incurred; so that if it were necessary that the amount of liability that she in-

(a) See R. S. O. 1887, ch. 125, s. 6.

Judgment.

Street, J.

curred should be stated in the chattel mortgage, then the chattel mortgage, it appears to me, does not come under the Chattel Mortgage Act at all. They have stated in the chattel mortgage, as nearly as they can, the amount of the liability that was to be incurred; and that was the only thing they could do. I do not think it was ever intended that no chattel mortgage should be given at all under such circumstances; so that if it could not be within the Act, then it must be without the Act.

The rights of the execution creditors, therefore, I think were to sell the property only subject to her rights under the chattel mortgage. They have taken the opposite view, and have sold the property clear of her rights. They had no right to do that in my judgment, and I think that issue must be found against the execution creditors, the plaintiffs in the case, and that they should pay the costs.

* * * * *

I have not overlooked the fact that the chattel mortgage is dated on the 13th of November, and that the mortgage of real estate is not dated until November 17th. The chattel mortgage is signed by both parties on the afternoon of November 13th, but it does not seem to have been completed and the affidavit of *bona fides* does not seem to have been executed until the 17th. The 17th I should treat then as the day of execution, really, of the chattel mortgage.

The judgment should contain an order for the payment out of the money in Court; and I have stayed the entry of judgment until after the 4th day of the next sitting of the Divisional Court for the disposal of any motion to be made to the Divisional Court at such sitting; so the money cannot be got out till after this is disposed of.

The plaintiffs to the issue, the execution creditors, now moved before the Divisional Court by way of appeal from this decision.

The motion came on for argument on June 12th, 1890, before BOYD, C., and FERGUSON, J.

Moss, Q. C., for the plaintiffs. The husband making a second mortgage to the same mortgagee without any further bar of dower, the lands might be sold and the wife would have no claim. [BOYD, C.—Her dower would take priority over the second mortgage would it not?] I submit not. In such case the husband does not die seized; the land is sold in the life time of the husband. *Re Croskery*, 16 O. R. 207, does not decide the point. [FERGUSON, J.—I remember at the time of *Re Croskery*, thinking I had overlooked a real point in *Sorenson v. Smart*, 9 O. R. 640, and that the Chancellor's view was entirely right.] We think that on the evidence there was no real *bonâ fide* intent to secure her, but the intent was to secure the goods against the creditors. She is not entitled to anything unless it is shewn that she sustained a loss. It is of no consequence to her in one way when the sale takes place. [BOYD, C.—If the land were sold under the mortgages the surplus, if any, would be paid into Court to answer the claim of the wife.] But it is only by the lands being sold and the prior mortgage satisfied that it can be ascertained whether there will be any surplus. [BOYD, C.—The points seem to be was there any tangible value in what she gave up, and was the arrangement honestly entered into? She had inchoate dower in what was conveyed, what its value was is another thing. Can you have any higher right against the goods than you would have had against the lands?] At the very outside all she could be entitled to would be to have the money impounded to see if she survives her husband. [BOYD, C.—Assuming *bona fides* the fund would have to remain in Court to abide results.] [FERGUSON, J.—Is there no way of ascertaining the value of her inchoate right of dower, and distributing the money?] I think not, except by consent. We say that on the facts, as they ought to be found, it amounted to a voluntary gift by the husband to her at a time when he was not in a position to make a voluntary gift. That this was a device by which he would be able to live on his place, and hold it against his creditors.

Argument.

C. J. Holman, contra. The issue is whether certain goods or some part thereof, were at the time of the seizure the property of the execution creditors. We say there was default because they have not protected her right of dower. Be it worth what it may we are entitled to have it protected. There was default here. Our position is then the mortgage is in default, under the mortgage we are in possession of these goods, and have a lien on them. [BOYD, C.—But your rights as dowress not having accrued, you should not have a present right to the goods.] I think I can establish from the evidence that the right of dower bore a fair proportion to what we received. We were to have our right of dower preserved and to have the mortgage discharged. [FERGUSON, J.—Your mortgage, supposing it to be all right, was a security to secure to you a right which may never arise. If it never accrues, this property is the property of the debtor. Let the property then remain to indemnify you, but if your client should die first, why should not the creditors get the property?]

Moss, Q. C., in reply. The money should be kept under the eye and under the control of the Court until we see whether she survives her husband. It all comes back to the same question. Assuming that there is default,—though I maintain failure to indemnify against loss is the only default,—but assuming that there is default, surely the rights are then to ascertain what loss she has suffered by the default; and that can only be such dower as she has lost by signing, and that cannot be ascertained until these contingencies happen.

June 30th, 1890. FERGUSON, J.:—

In this case the judgment is in favor of the defendant who is the claimant in the interpleader issue. It directs the payment of the costs by the plaintiffs the execution creditors. It also directs the payment out to the defendant of the moneys in Court. The only part of the judgment that I

think is not correct is the part directing the payment of the moneys to the defendant. Judgment.
Ferguson, J

The chattel mortgage under which the defendant claims was for the purpose of securing her against loss, damages, costs, &c., that she might sustain or be put to by reason of her executing certain mortgages for the purpose of barring her dower. This I think states substantially what appears, though many more words are employed in the mortgage.

Her husband is still living and it does not appear that the defendant has yet sustained any such loss or damage. The money in Court represents, as I understand, the property embraced in the chattel mortgage. Should it turn out that the defendant never becomes entitled to dower out of the lands, it is difficult to perceive that she will sustain loss or damage by reason of her having so executed the mortgage thereon, and notwithstanding some arguments in respect of certain breaches of stipulations in the mortgage under which her claim is, I think the matter should be looked at according to its substance, and in the way that I have stated.

The money should, I think, remain in Court to abide further order. In this way the defendant will have the same security that she had by the mortgage; and if she does not become entitled to the money I see no good reason why it should not be available to the creditors of her husband who was the owner of the property mortgaged to her.

With this variation I think the judgment should be affirmed.

I agree in the disposition of the costs made by the Chancellor.

BOYD, C.:—

The mortgage is good only to the extent to which the wife had valuable interest as inchoate dowress in land wherein she barred her dower.

Judgment. I think the money represents her claim for dower and
Boyd, C. should be deposited in Court to abide the provisions of the
Dower Act, unless the parties can agree as to a division.

The motion against the judgment as made fails and the
plaintiff should pay the costs of it to the defendant.

A. H. F. L.

[CHANCERY DIVISION.]

KEYES V. KIRKPATRICK.

*Bankruptcy and insolvency—Assignee for creditors—Power of assignee to
compromise claims—Leave to creditor to bring action—R. S. O. (1887)
ch. 124.*

A plaintiff, a creditor, served a notice on an assignee for creditors, pursuant to R. S. O. (1887), ch. 124, sec. 7, sub-sec. 2, requiring him to take proceedings to set aside a certain bill of sale made by the insolvent and afterwards served on him a notice of motion for an order giving him, the creditor, permission to bring the action. After being served with this notice, however, the assignee, believing that he had authority to do so, with the approval of a majority of the inspectors and creditors present at a meeting called for the purpose, made a settlement with the grantee of the bill of sale, which settlement, it also appeared, was advantageous to the estate. The plaintiff then, pursuant to his notice of motion, obtained an order from a Judge, giving him leave to bring this action impeaching the bill of sale, without, however, the settlement being brought to the notice of the Judge:—
Held, that the settlement was valid and binding.

Statement. THIS was an action brought by John E. Keyes, assignee for the creditors of one John W. McCormick, under an assignment made to him on September 18th, 1889, and was for the purpose of having a certain memorandum or bill of sale, dated August 28th, 1889, whereby the said McCormick professed to make a transfer of certain goods and chattels to the defendant, declared fraudulent, preferential and void as against the plaintiff and the creditors of John McCormick. The action was commenced on February 12th, 1890.

The defendant pleaded that before the commencement of this action, on November 25th, 1889, the plaintiff and himself settled and compromised all differences and disputes between them with regard to the bill of sale in.

question, the terms of the said compromise being contained in a written document of that date, and this settlement was duly proved at the trial.

It appeared that at a meeting of creditors on September 28th, 1889, a resolution was carried under which the inspectors and assignee were to confer with the defendant and see if a settlement could be arrived at as to his claim under the bill of sale in question, and report to the creditors the result of their deliberations.

This action was really brought by a creditor named Hanning, who had, on November 27th, 1889, obtained an order allowing him to proceed in the name of the assignee, he having first, in accordance with R. S. O. 1887, ch. 124, sec. 7, sub-sec. 2, served a notice on the assignee requiring him to take these proceedings. This notice was served on the assignee before the compromise with the defendant was effected.

The other facts of the case material to the present report, sufficiently appear from the judgments.

The action came on for trial at the Berlin Spring Assizes, 1890, before FALCONBRIDGE, J., who gave judgment as follows :

"I do not think I can get over *Johnston v. Hope*, 17 A. R. 10. It seems to me it has not been proved that the defendant Kirkpatrick had knowledge that McCormick was insolvent and unable to pay his debts; and therefore the action must be dismissed. I do not think the assignee had any right to attempt to deal with his claim, in face of the notice of motion actually pending; and, as far as the defendant was concerned, he had a right to make a reasonable settlement, if he could. Action dismissed with costs."

The plaintiff now moved before the Divisional Court by way of appeal from this decision on June 23rd, 1890, before BOYD, C., and FERGUSON, J.

Du Vernet, for the plaintiff (a).

(a) As the judgments of the Divisional Court entirely turn upon the compromise before action, only that part of the argument having reference thereto is here reported.—REF.

Argument.

W. Cassels, Q.C., for the defendant. The plaintiff has no remedy at all and cannot sue. The assignee and the defendant made a settlement before suit. The estate is bound by the compromise, which the action if successful would upset: *Anon v. Gelpcke*, 5 Hun 245, shews that a trustee can compromise claims for the benefit of creditors. See also *Leeming v. Lady Murray*, 13 Ch. D. 123; Yate Lee's Law of Bankruptcy, 3rd ed. p. 475.

Du Vernet, in reply. R. S. O. 1887, ch. 124, secs. 16, 17, sub-sec. 2, shew that a meeting of creditors was necessary, or the intervention of the County Judge. Besides the alleged compromise was made after the application for the order allowing the action to be brought. I refer to *In re Jarvis v. Cook*, 29 Gr. 303.

June 30th, 1890. BOYD, C. :

The evidence shews that a compromise was arrived at between the assignee and the defendant in regard to the claim now in litigation. This was in pursuance of a resolution of creditors duly called, by which it was left to the inspectors and assignee to see if a settlement could be arrived at, and report to the creditors the result of their deliberations. Two of the three inspectors and the assignee approved of the terms of settlement arrived at, and it is well proved that it was in the circumstances the best thing to do. The solicitor of the assignee says that he thought the settlement was a good one, and in the interests of the estate. There was a meeting of creditors called, who approved of the action taken, and other creditors being spoken to, also sanctioned what was done. It is not very clear whether the meeting was in all respects formal, but the fair result of the evidence is, that with the exception of the creditor now suing in the name of the assignee, there was a general consensus in favour of the compromise. The amount involved was \$200, of this every one, including the said creditor, agreed that the defendant was entitled to \$50. As a part of the settlement the assignor gave up to the

estate his claim for exemption to the extent of \$100, which left only \$50 under discussion. The chattels in dispute consisted of horses, the keep of which averaged \$7 or \$8 a week, and a speedy settlement was for this and other reasons deemed advisable. Now, the statute R. S. O. 1887, ch. 124, cannot be so read as to justify a compromise by the body of creditors, and the prosecution of an action in the name of the assignee by one creditor to impeach the subject-matter of that which was compromised. The attack here is on a bill of sale, but before action the assignee had settled the claims of the creditors, and executed a release to the defendant. That release is attacked on various grounds in the defence, but not I think successfully. It would be unjust to hold the bill of sale invalid on the one hand, and on the other hand for the creditors to retain the benefit of the \$100 exemption conceded to them by the insolvent.

The action of the inspectors and the majority of the creditors in effecting a compromise under the Act must bind a dissentient creditor unless he takes direct steps to impeach it for some satisfactory reason. I do not see that it matters that notice of motion had been given by the creditor under sec. 7, sub-sec. 2, if the order made by the Judge was without notice of the compromise actually and *bonâ fide* effected prior thereto. The second meeting of creditors was on November 9th; notice of motion to the assignee for the use of his name on November 20th; release executed November 25th; order to bring the action November 27th, and action begun February 12th, 1890. No information was laid before the Judge who made the order of the pendency of the compromise proceedings, nor was he aware of the release given by the assignee. That release must work a disqualification in the right of action in the assignee's name if it was a valid and honest release, and of that I entertain no doubt. For this reason I think the judgment should be affirmed with costs.

Judgment.

Boyd, C.

Judgment. FERGUSON, J. :—

Ferguson, J.

This is an action by an assignee for the benefit of creditors of one McCormick, to set aside a transaction made between McCormick and the defendant. The assignee had made a settlement of the matter, and as shewn by the evidence, had given a release, and was unwilling to bring the action until an order under the provisions of the Act was obtained by one of the creditors. It appears that the settlement and release took place after the notice of motion to obtain the order, and it is contended that pending such notice this should not have been done. I fail to perceive the soundness of this contention; for if it is correct and full effect is given to it, it seems to me that any creditor might at any time by giving such a notice stop or materially impede the proceedings for the winding up of an estate by an assignee for creditors. It was not, I think, to be assumed by the assignee that because a notice was given, an order would be made; and if the conduct of an assignee is honest, and in all other respects good, though during the pendency of such a notice, I do not see that it would be void or bad simply by reason of the notice.

After a perusal of the evidence in this case, I am of the opinion that the conduct of the assignee touching the settlement and release, was honest and in perfect good faith, and I cannot say that it appears that it was unauthorized. It also appears, I think, that the effect was not disadvantageous to the estate, which, however, seems to have been so small that it was not easily possible that each creditor could have been very severely injured.

At the first meeting of creditors there seems to have been, as a witness puts it, a great lukewarmness amongst the creditors, and they seemed to think that nothing could be "made out of this thing;" but there seems to have been general instructions to the assignee to do the best he could, and afterwards two of the inspectors told the assignee that what he was purposing to do was the best thing he could do. A second meeting of the creditors was called. It is.

said, however, that a quorum did not attend. Whatever ^{Judgmen} that may mean, I do not see how an assignee can compel ^{Ferguson, J.} the attendance of creditors at a meeting. Looking at the whole of the evidence I think it may fairly be said that the settlement was honorably made by the assignee, he believing that he had authority to make it, and I incline strongly to the opinion that the authority was sufficient; that it was not disadvantageous to the estate, but the contrary of this; and besides the assignee obtained by it \$100 worth of exemptions which would not otherwise have been available to the estate; and seeing that there was in fact some authority, that all was done under the belief that there was all necessary authority, I think it would not be a proper thing under such circumstances to hold the settlement bad, and if it is so held to be good this action must fail.

There may be other and different reasons why the action cannot succeed, but this one seems to me sufficient.

I think the judgment should be affirmed.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

BLACK V. ONTARIO WHEEL COMPANY.

Master and servant—Accident to servant—Fall of elevator—Negligence—Master's knowledge of defects—Want of reasonable care—Common law liability—"Workmen's Compensation for Injuries Act"—Factories Act, R. S. O. ch. 208, sec. 15, sub-sec. 4.

In an action by a workman against his employers to recover damages for injuries sustained owing to the falling of the cage of an elevator in the defendants' factory, the negligence charged was in the manner in which the heads of the bolts were held, and in the nature of the safety catch used upon the cage.

There was no evidence to shew that the defendants were or should have been aware that the bolts were improperly sustained. They had employed a competent contractor to do this work for them only a few weeks before, and it was not shewn that the alleged defect might readily have been discovered.

Held, that the defendants were not liable upon this head :—

Murphy v. Phillips, 35 L. T. N. S. 477, distinguished.

The safety catch was made for the defendants by competent persons, and there was no evidence that it was not one which was ordinarily used :—

Held, that the defendants were not liable upon this head unless there was a want of reasonable care on their part in using the appliance which they used ; and it was no evidence of such want of reasonable care merely to shew that a safety catch of a different pattern was in use ten years previously by others, or even that it was at present in use, and that a witness thought it might have prevented the accident ; and as no negligence was shewn, the defendants were not liable either at common law or under the Workmen's Compensation for Injuries Act.

By sec. 15, sub-sec. 4, of the Factories Act, R. S. O. ch. 208, "All elevator cabs or cars, whether used for freight or passengers, shall be provided with some suitable mechanical device, to be approved by the inspector, whereby the cab or car will be securely held in the event of accident," &c.

There was no evidence to shew whether this particular safety catch had been approved by the inspector :—

Held, that the onus was upon the plaintiff to prove that the catch had not been approved ; and if it had neither been approved nor disapproved, the question still was whether the catch used were of such a character and pattern as to make the use of it unreasonable.

Statement.

THIS was an action to recover damages for injuries sustained by the plaintiff owing to the falling of the cage of an elevator in the defendants' factory, and was tried before ARMOUR, C. J., with a jury, at the Spring Assizes, 1890, at Kingston.

The plaintiff at the time he received his injuries was a workman in the defendants' employ, and appeared to have been lawfully in the elevator when the cage fell. The

case of the plaintiff as to the cause of the falling of the cage was that certain bolts which passed through the floor, and upon which was suspended a portion of the machinery for working the elevator, were not sufficiently secured by washers under their heads, or otherwise; that in consequence the heads were drawn through the floor upon which they rested; the machinery was thrown out of gear; a number of cogs upon one of the wheels were broken off, and the cage was allowed to come down with great violence, causing the plaintiff's injuries. It is not necessary to examine the theory set up by the defendants as to the cause of the accident. It was shewn that the machinery for working the elevator had been put in to the defendants' factory by a firm of independent contractors, whose business it was to do work of that character; it had only been in use for a few weeks before the accident occurred. The floor through which the bolts passed and upon which they were suspended was a thick pine floor; after the accident hickory instead of pine was used and washers were put under the heads of the bolts.

It was shewn that a safety catch formed part of the cage of the elevator but that it failed to work, the reason given being that the rope by which the cage was suspended neither broke nor became slack during its descent, so that the catch was never loosened. A witness was called who stated that in a factory in which he had been employed some ten years before, a safety catch was made and used, worked by a governor similar to that used with the safety valve in many steam engines and which came into operation upon any increase in the speed of the descent of the cage without regard to the slackening of the rope. It was not shewn whether or not the safety catch used by the defendants had been approved by the inspector under section 15 of the Factories Act, ch. 208 R. S. O. It was contended on the part of the plaintiff that, as this catch had not worked so as to prevent this accident, the factory was an unlawful one within the meaning of that Act, or that at all events there was negligence on the part of the defendants in using it.

Statement.

At the conclusion of the plaintiff's case the learned Chief Justice entered a nonsuit, being of opinion that there was no evidence to go to the jury of negligence on the part of the defendants.

At the Easter Sittings of the Divisional Court 1890, the plaintiff moved to set aside the nonsuit and for a new trial upon the law and evidence.

The motion was argued before the Divisional Court, (FALCONBRIDGE and STREET, JJ.) on 26th May, 1890.

Britton, Q. C., for the plaintiff. The defendants are liable at common law. *Murphy v. Phillips*, 35 L. T. N. S. 477, shews that where the employer ought to know of the defect, and the injured employee did not know it, the latter can recover. The plaintiff is entitled to recover under the Workmen's Compensation Act, R. S. O. ch. 141, as amended by 52 Vic. ch. 23 (O.). The defendants are also liable under the Factories Act, R. S. O. ch. 208, sec. 15. There was evidence to go to the jury under any one of these. It was well known to the superintendent of the defendants' works that the plaintiff and other employees were in the habit of using the elevator. The cause of the elevator falling was the wheels getting out of mesh. They got so by hangers being put through the floor. This was negligence. Then the want of safety catches was a defect under the Factories Act. The fact of the accident happening at all is evidence of negligence to be explained: *Cataraqui Bridge Co. v. Holcomb*, 21 U. C. R. 273; *Wilmot v. Jarvis*, 12 U. C. R. 641. Apart from the statutes there was evidence to go to the jury to shew that the superintendent could have discovered by a reasonable examination that this elevator was not secure. The plaintiff shews that an accident happened, and proves a sufficient cause for it existing. It is like the case of an engine emitting sparks and the grass being found on fire. If there is any evidence at all the case should go to the jury: *Madden v.*

Hamilton Forging Co., 18 O. R. 55; *Le May v. Canadian Argument. Pacific R. W. Co.*, *ib.* 314; *McGibbon v. Northern R. W. Co.*, 14 A. R. 91.

E. D. Armour, Q. C., for the defendants. The plaintiff must establish, 1st, what the duty is, and, 2nd, that it has been neglected. To suggest a theory is not enough. There is no positive evidence that the cause assigned by the plaintiff was the cause of the accident. The cause assigned is suggested as a theory by just one witness. The plaintiff should establish it positively. So far from his being able to do so, it is a mechanical impossibility that the accident was caused as alleged. The cases cited with regard to the doctrine *res ipsa loquitur* do not apply to a case of master and servant. The plaintiff has not made out his case when he has shewn that an accident happened in a factory; he has to shew a duty and a breach. A servant takes a risk that strangers do not take. See *Roberts & Wallace on the Duty and Liability of Employers*. The statutes do not carry the case any further. Knowledge on the part of the master and ignorance on the part of the servant are necessary to constitute a cause of action: *Griffiths v. London and St. Katharine Docks Co.*, 13 Q. B. D. 259. Where it is alleged that some other person than the employer was negligent, the case comes under the statute only in certain specified cases. In this case the negligence was that of the contractors, for which we are not responsible. See sec. 6 of 52 Vic. ch. 23 (O.). The defendants are not for ever and ever responsible for the fault of the contractors. The absence of safety catches was not the cause of the accident at all.

Britton, in reply.

June 21, 1890. The judgment of the Court was delivered by

STREET, J.—(after stating the facts as above):—

The plaintiff contends that the defendants are liable at common law, and under the Workmen's Compensation for

Judgment. Injuries Act, ch. 141, R. S. O., and also under the Factories
Street, J. Act, ch. 208, R. S. O.

In order to render the defendants liable at common law, it is necessary to shew negligence on the part of the employer, and ignorance on the part of the workman. The negligence relied upon here is, firstly, the manner in which the heads of the bolts were held; and, secondly, the nature of the safety catch used upon the cage of the elevator.

There was no evidence to shew that the defendants were aware that the bolts were improperly sustained, nor of any facts from which it can be said that they should have made themselves aware of the fact. They had employed a competent contractor to do this work for them only a few weeks before, and it is not shewn, but rather the contrary, that the alleged defect was one which might readily have been discovered. The case differs in this respect from that of *Murphy v. Phillips*, 35 L. T. N. S. 477, relied on by the plaintiff, where the employer was held to be guilty of negligence because he did not replace or repair a chain which had been constantly used for many years, and was plainly and visibly in a dangerous state. With regard to the nature of the safety catch used by the defendants, it was made for the defendants by competent persons, and there is no evidence that it was not one which was ordinarily used.

The evidence upon which it is sought to charge the defendants with negligence in regard to its use is that of A. H. Black, a brother of the plaintiff, who stated that ten years before the trial he had been employed by a firm in Toronto who manufactured and sold a safety catch worked by a governor, which he said would have prevented this accident. This witness had had no experience in such matters for the ten years preceding the trial; there is therefore no evidence that this particular device has been adopted; for all that appears it may have gone into disuse for some defect of its own. The question in such cases must always be whether there was a want of reasonable care on the part of the defendants in using the appliance

which they used. It is no evidence of such want of reasonable care merely to shew that a safety catch of a different pattern was in use ten years ago by others, or even that it is at present used by some persons, and that a witness thinks it might have prevented the particular accident which here took place. "The line must be drawn in these cases between suggestions of possible precautions and evidence of actual negligence such as ought reasonably and properly to be left to a jury:" *Crafter v. Metropolitan R. W. Co.*, L. R. 1 C. P. 300, at p. 304; *Walsh v. Whiteley*, 21 Q. B. D. 371.

Judgment.

Street, J.

I am of opinion, therefore, that the plaintiff could not have succeeded at common law, because I can find no evidence of negligence on the part of the employer.

The 1st sub-sec. of the 3rd sec. of the Workmen's Compensation Act, ch. 141, R. S. O., as amended by sec. 3 of ch. 23, 52 Vic. (O.), provides that "Where personal injury is caused to a workman by reason of any defect in the condition or arrangement of the ways, works, machinery, plant, buildings, or premises connected with, intended for, or used in the business of the employer," the workman shall have the same right of compensation against the employer as if the workman had not been a workman of nor in the service of the employer, &c.

Sub-sec. 1, of sec. 5 of ch. 141, as amended by sec. 8 of ch. 23, 52 Vic., provides that a workman shall not be entitled under the Act to any remedy against the employer under sub-sec. 1 of sec 3 of ch. 141, "unless the defect therein mentioned arose from or had not been discovered or remedied owing to the negligence of the employer or of some person entrusted by him with the duty of seeing that the condition or arrangement of the ways, works, machinery, plant, building, or premises are proper."

To entitle the plaintiff to succeed under this Act it is necessary therefore to shew negligence on the part either of the employer or of some person entrusted by him with the duty above mentioned.

I have already given my reasons for thinking that no

Judgment. negligence was shewn on the part of the employers. For
Street, J. the same reasons I must hold that no negligence was shewn on the part of any one else employed by them. The negligence alleged in connection with the bolts was in fact on the part of the contractors who put in the machinery for working the elevator and not on the part of the defendants or any of their workmen or employees, and the negligence alleged in connection with the safety catch was not proved.

There remains the question of the defendants' liability under the Factories Act, ch. 208, R. S. O.

The 4th sub-sec. of the 15th sec. of that Act provides that "All elevator cabs or cars, whether used for freight or passengers, shall be provided with some suitable mechanical device to be approved by the inspector, whereby the cab or car will be securely held in the event of accident to the shipper, rope, or hoisting machinery, or from any similar cause."

There was no evidence offered as to whether this particular safety catch had been approved by the inspector or not; if it had been approved by the inspector, then the factory would not be an unlawful factory even although the catch had failed to act; so that it seems that the onus should be upon the person alleging that the factory was an unlawful one to prove that the catch had not been approved by him. If, however, there were a safety catch there which had neither been approved nor disapproved by the inspector, the plaintiff must be driven back to the question whether the catch used were of such a character and pattern as to make the use of it unreasonable. The employer is not made an absolute insurer of the safety of his employees either under the Factories Act or the Workmen's Compensation Act.

For these reasons I think the nonsuit was right, and that the motion to set it aside should be dismissed with costs.

[QUEEN'S BENCH DIVISION,]

HEPBURN V. TOWNSHIP OF ORFORD ET AL.

Water and watercourses—"Ditches and Watercourses Act, 1883"—Work not in accordance with award—Remedy under sec. 13—Costs.

Where an award has been made under the "Ditches and Watercourses Act, 1883," the only remedy for the non-completion of the work in accordance with the award is that provided by sec. 13 of the Act.

Murray v. Dawson, 17 C. P. 588, followed; and *O'Byrne v. Campbell*, 15 O. R. 339, distinguished.

No other or greater costs were allowed to the defendants than if they had successfully demurred instead of defending and going down to trial.

THE plaintiff by his statement of claim alleged: (1) Statement. That he was the owner and occupier of the south one-quarter of lot 16 in the 4th concession of the township of Orford, in the county of Kent. (2) That the defendant McKillop was the owner and occupier of the adjoining east one-quarter of the same lot, and also of the south half of lot 17 in the same concession. (3) That the defendant Allison was the owner and occupier of the north half of lot 17, across the northerly part of which the Canada Southern Railway ran. (4) That the defendant Campbell was the owner and occupier of the adjacent lot 16 in the 3rd concession. (5) That the defendants the township of Orford were a municipal corporation which had charge of, and jurisdiction and control over, and for the purposes of this action were the owners of, a public highway or road running between the 3rd and 4th concessions and between the lands owned by Campbell and those owned by the other defendants. (6) That for many years past these lands and road had been drained, so far as they were drained, by a natural depression or watercourse running across the lands of the plaintiff and of the defendants McKillop and Anderson in a north-easterly direction, and thence under and past the railway, and this watercourse had been somewhat improved from time to time by excavations therein for the purpose of making a ditch or drain, but as the lands became cleared and improved, and

Statement. the road more travelled, they required more and better drainage than was afforded by this watercourse and the ditch or drain therein. (7) That on or about the 4th October, 1886, the engineer of the township, appointed under the provisions of the Ditches and Watercourses Act, made an award for the deepening and widening of the ditch or drain. (8) That by this award the defendants were required greatly to enlarge and improve this ditch or drain, and to make and straighten the course for the water of the size and dimensions mentioned in the award, and all of such work was to be done by the defendants along, from, and below and north-easterly of the plaintiff's land, and within the time limited in the award. (9) That some of the defendants appealed from this award, and on or about the 17th November, 1886, the Judge before whom the appeal was tried slightly amended the award, but otherwise confirmed it. (10) That if the drain or ditch had been made by the defendants as provided for in the award, or in the award as amended on appeal, it would have effectually drained the plaintiff's lands. (11) That the defendants assumed and pretended to act and do work under and in pursuance of the award as amended on appeal, but they did not construct the drain as required thereby, and did not make it within the time specified and required, or of the size or dimensions or in the course specified, and by reason thereof the plaintiff was deprived of the drainage of his land to which he was entitled, and he thereby suffered great loss and damage to his crops and lands, and he was deprived of the use and benefit thereof, and the value of his farm was not enhanced as it would have been if such work had been done and the drain completed by the defendants. (12) That part of the drain required by the award and amendments extended upwards, through, and across and above the plaintiff's land, and that portion was properly constructed within the time limited, and by reason thereof the water was carried down upon the plaintiff's land more rapidly and in greater quantities than theretofore, and the loss

and damage occasioned by the delay and default of the defendants was much greater than it otherwise would have been. (13) That the defendants, so far as they acted under and in pursuance of the award, did the work in a careless, negligent, and unskilful manner, and by reason thereof the drain was less serviceable for the purpose for which it was intended, and the plaintiff did not receive the benefit therefrom to which he was entitled, and by reason thereof he had suffered great loss and damage. (14) That the plaintiff had from time to time requested the defendants to make the respective portions of the drain allotted to them respectively by the award as provided therein, but that they had neglected and refused so to do. Statement.

The prayer of the statement of claim was for a declaration that the plaintiff was entitled to have the drain made, completed, and maintained by the defendants; for damages; and that the defendants might be ordered to make and complete the drain.

The defendants answered separately, but it is unnecessary to set out their statements of defence.

Issue was joined, and the cause was heard at the sittings at St. Thomas on the 3rd December, 1888, by FERGUSON, J., who at the close of the plaintiff's case dismissed the action with costs, upon the facts therein appearing, without saying anything as to the question of jurisdiction; and counsel saying that there should be only one set of costs, His Lordship said: "I think I will leave that to the taxing officer. I say nothing about it. The action is dismissed with costs."

At the Hilary sittings of the Divisional Court, 1889, the plaintiff moved to set aside the judgment and to enter judgment for the plaintiff, or for a new trial, on the grounds: (1) That the judgment was contrary to law and evidence, &c. (2) That the plaintiff's claim was proved at the trial, the evidence of the engineer and other witnesses shewing the ditch or drain in question to be incom-

Statement.

plete according to the award made by the engineer and the amendments thereto, under which the drain should have been constructed; and in consequence of the award not being carried out the plaintiff sustained damages, and should have been awarded the same at the trial or by a reference to ascertain them.

The motion was argued before ARMOUR, C. J., and FALCONBRIDGE, J., on the 15th February, 1889.

Aylesworth (with him *N. Mills*) for the plaintiff. The Ditches and Watercourses Act of 1883 was the one in force when the award was made. It is said that the plaintiff's only remedy is under sec. 13* of that Act (sec. 15 of R. S. O. 1887 ch. 220); but that provides only for the building of the drain, not for compensation or redress for actual damages already suffered. *O'Byrne v. Campbell*, 15 O. R. 339, shews that this action lies. On the evidence given by the plaintiff the case could not have been withdrawn from a jury. The plaintiff is entitled to the relief which he asks, a declaration of his right to have the water flow through the lands of the defendants, and a mandatory order to have the work completed, as well as damages.

W. R. Meredith, Q. C., for the defendants the township of Orford and the defendant Campbell. The plaintiff has no remedy by action. Without the statute the plaintiff would have no right to have the water carried over the defendants' lands, and so his rights are entirely governed by the statute. I refer to *Murray v. Dawson*, 17 C. P. 588.

*13. The engineer shall, at the expiration of the time limited by the award for the completion of the work, inspect the ditch or drain, if required in writing so to do by any of the parties interested, and if he finds the work or any portion thereof not completed in accordance with the award, he may let the same, in sections, as apportioned in the award, to the lowest bidder therefor, taking such security for the performance thereof within the time to be limited, as he may deem necessary, but no such letting shall take place till after four clear days' notice in writing of the intended letting has been posted in at least three conspicuous places in the neighbourhood of the work, and notice thereof is sent by registered letter to such parties interested in said award as are non-resident in said municipality, but if the engineer is satisfied of the *bona fides* of the persons doing the work, and there is good reason for the non-completion thereof, he may, in his discretion, extend such time.

McKillop, for the defendant McKillop.

Argument.

Charles MacDonald, for the defendant Allison.

Aylesworth, in reply.

June 27, 1890. The judgment of the Court was delivered by

ARMOUR, C. J.:—

I do not agree with the conclusion arrived at by the learned Judge at the close of the plaintiff's case upon the facts then proved, but I think that sufficient was proved in the plaintiff's case to compel the defendants to go into evidence in their defence, and consequently I would be in favour of granting a new trial were we of opinion that this action was maintainable in point of law.

The award was made under the "Ditches and Water-courses Act, 1883," and we think that the only remedy open to the plaintiff for the work not being completed in accordance with the award, which is what he complains of in his statement of claim, was the remedy provided by section 13 of that Act.

We think that this case is governed by *Murray v. Dawson*, 17 C. P. 588, and is not distinguishable in principle from it, and it was not intended by anything that was said in *O'Bryne v. Campbell*, 15 O. R. 339, to affect the principle so laid down.

We think, therefore, that this action must be dismissed; but as this question might have been raised by demurrer without the expense of a trial, no other or greater costs will be taxed to the defendants than would have been taxed to them had they simply demurred to the statement of claim and the demurrer had been decided in their favour; and whether or not there should be only one set of costs we leave to the taxing officer.

Judgment. FALCONBRIDGE, J. :—

Falconbridge
J.

I agree that plaintiff's only remedy is that provided by section 13 of the "Ditches and Watercourses Act, 1883," and I concur in my lord's disposition of the motion.

[COMMON PLEAS DIVISION.]

THE ONTARIO NATURAL GAS COMPANY V. SMART ET AL.

AND

IN RE THE ONTARIO NATURAL GAS COMPANY AND THE
CORPORATION OF THE TOWNSHIP OF GOSFIELD SOUTH.*Municipal corporations—Mineral gas—R. S. O. ch. 184, sec. 565—Form of
by-law—Indemnity—Right to reservoir.*

Mineral gas is a "mineral" within the meaning of sec. 565 of the Municipal Act, R. S. O. ch. 184.

A lease under that section should be of the right to take the minerals, and not of the highway itself. The lease in this case was of a portion of the highway, "for the purpose of boring for and taking therefrom oil, gas, or other minerals": the quantity of land was no more than was necessary for the company's purposes, and the rights of the public were fully protected:—

Held, that the practical difference here was so small as not to constitute a ground for quashing the by-law.

The council before passing the by-law, insisted on an indemnity from the gas company against any costs and damages that might be incurred by reason of the passing of same:—

Held, that under the circumstances, this could not be deemed to be evidence that it was not passed in the public interest.

The plaintiffs, by first sinking a well on the land near the defendants, did not thereby acquire the right to restrain the defendants from using the reservoir lying under the said land.

THIS was a motion for an injunction to restrain the defendants, including the corporation of the Township of Gosfield South, from proceeding with the sinking of a well upon one of the concession lines in that township for the purpose of obtaining natural gas. Statement.

There was also a separate motion on behalf of the same plaintiffs and Mr. R. A. Coste, to quash a by-law of the corporation of the township of Gosfield, passed for the purpose of giving to certain persons a lease of the right to bore for natural gas upon the road allowance in question.

On May 31, 1890, the motion was argued.

Robinson, Q.C., and *H. S. Osler*, for the plaintiffs.

Aylesworth, Q.C., for the defendants, other than Walker.

W. H. Blake, for the defendant Walker.

Judgment. June 5, 1890. STREET, J.:—

Street, J.

It appears from the evidence that some months before the passing of the by-law in question, the plaintiffs sank a well near the road in question for the purpose of obtaining natural gas and were successful in doing so. For a time they supplied it to one or two manufacturers, but owing to some defect in the piping, which they used to conduct the gas from the mouth of the well, the gas took fire and burned for several days before it could be extinguished. This happened some ten months ago, and the plaintiffs have ever since been unable, for lack of money, to lay pipes to conduct the gas to where it is wanted for consumption, and the well has remained covered and closed in during all that period.

The defendants, other than Hiram Walker & Sons, who are made defendants merely because they hold the land in trust for the plaintiffs, and other than the township of Gosfield, are members of a partnership called the Kingsville Citizens Natural Gas Company, formed for the purpose of finding and supplying natural gas to the people of Kingsville. They bored one or two wells in different parts of the township, but so far have failed in striking any vein of gas. Then they applied to the township council to exercise the power contained in sec. 565 of the Municipal Act R. S. O. ch. 184. The council, accordingly, gave the notices required by that section of their intention to pass a by-law enabling them to exercise their powers under it.

The passing of the by-law and the right of the council to pass it, were contested by the plaintiffs. The council appear to have doubted whether natural gas was a mineral within the meaning of the section, and whether they had power to authorize anyone to take it from under the road. A very strong and widespread feeling, however, seems to have prevailed in the township in favour of the passing of the by-law; and the council finally passed it, first taking a bond from the applicants to indemnify them against any expense to which they might be put by reason of their doing so.

The by-law authorizes the granting of a lease to certain members of the Kingsville Gas Company, of a portion of the highway 30 feet in width and 110 feet in length for one year, at the rental of \$1, "for the purpose of boring for and taking therefrom oil, gas, or other minerals in, upon, or under the said part of said land or highway." Then follow certain stipulations for the protection of public travel along the highway. The by-law goes on to provide for a renewal for four years of the lease at the annual rent of \$50, at the lessees' option.

Under the lease, which has been made pursuant to this by-law, the defendants, the Kingsville Gas Company, have erected a derrick and machinery for boring a well with the object of trying to obtain gas, and had already proceeded to the depth of 400 to 600 feet, when an injunction was moved for in the present action, since which time the work has been stayed, by an undertaking on the part of the defendants, pending the completion of the material for and against the motion.

The well of the defendants is only 205 feet from that of the plaintiffs, and the indications so far are that the strata in the two wells, at the depth of 300 feet at all events, are identical.

The main objection taken to the by-law and to the rights of the Kingsville Company is, that natural gas is not a mineral within the meaning of the 565th section of the Municipal Act; and that the council had therefore no right to pass the by-law.

I have referred to the meaning given to the word "mineral" in many dictionaries and also in the current works upon mines and mining, and to the discussions in a number of cases in which the question has been considered. See MacSwinney on Mines, pp. 11 to 17; Bainbridge on Mines, 4th ed., pp. 1 to 6; *Hartwell v. Camman*, 3 Morrison's Mining Reports, 229; the cases collected in *Earl of Rosse v. Wainman*, 10 Morrison's Mining Reports, pp. 398 to 421; *Allison and Evans Appeal*, 11 Morrison's Mining Reports pp. 142 to 151; *Johnston's Appeal*, 15 Morrison's Mining Reports, 556; *Dunham v. Kirkpatrick*, 101 Penn.

Judgment.

Street, J.

Judgment. 36; *Heat v. Gill*, L. R. 7 Ch. 699; *Lord Provost and*
 Street, J. *Magistrates of Glasgow v. Farie*, 13 App. Cas. 657; *Earl*
of Jersey v. Guardians, &c., of Meath Poor Law Union,
 22 Q. B. D. 555, 558; *Elwes v. Brigg Gas Co.*, 33 Ch. D.
 562.

In most, if not all of the cases to which I have referred, the word was used in connection with a context which threw some light upon the meaning and sense in which it was to be interpreted; for it appears to be a word which is capable of a very extended meaning when full scope may properly be given to it. For example in the report of the Geological survey of the State of Pennsylvania referred to in *Dunham v. Kirkpatrick*, 101 Penn., at p. 41, the mineral products of the State are classified as follows, "Petroleum, coal, natural gas, building stone, flagstone, building-brick clay, fire clay, limestone, iron ore, mineral paint, and mineral water." In that case however, the context of the deed in which the word "minerals" was used was held so to control its meaning as to prevent its extending to petroleum oil.

In *Heat v. Gill*, L. R. 7 Ch. 699, Mellish, L. J., stated, at p. 712, the result of the authorities to be that "a reservation of minerals includes every substance which can be got from underneath the surface of the earth for the purpose of profit, unless there is something in the context or in the nature of the transaction to induce the Court to give a more limited meaning."

This definition although criticised by Lord Halsbury in *Lord Provost and Magistrates of Glasgow v. Farie*, 13 App. Cas. 657, received the support of Lord Herschell in the same case, and was afterwards warmly approved by the Court of Appeal in the *Earl of Jersey v. Guardians of the Poor of Meath Poor Law Union*, 22 Q. B. D. 555.

It appears therefore, that the word is capable of a construction which would make it include natural gas; and the question is whether it is to be taken to have been used in section 565 of the Municipal Act in its widest, or in a more restricted sense.

That section is as follows: "The corporation of any

township or county, wherever minerals are found, may sell, or lease, by public auction or otherwise, the right to take minerals found upon or under any roads over which the township or county may have jurisdiction, if considered expedient so to do."

Judgment.

Street, J.

Sub-section 3 of the section provides that "The deed of conveyance, or lease to the purchaser or lessee under said by-law, shall contain a proviso protecting the road for public travel, and preventing any uses of the granted rights interfering with public travel."

There is absolutely nothing in this enactment which appears to control or restrict what the Legislature expressed or to explain what they meant when they gave the corporations mentioned in it the right to deal with "minerals."

I have been able to discover no reason why it should be held that the intention was to restrict the word used to any particular class or variety of minerals; if the township can grant the right to mine for iron or salt or oil, why should they not do so for gas? It is answered in the words of Chief Justice Gibson in *Schuyllkill v. Moore*, 2 Wh. 477, that "the best construction is that which is made by viewing the subject of the contract as the mass of mankind would view it, for it may be safely assumed that such was the aspect in which the parties themselves viewed it;" and it is urged that the mass of mankind would not view natural gas as being a mineral. On the other hand it is said by Lord Macnaghton in *Lord Provost v. Farie*, 13 App. Cas. 657, above referred to, at p. 690, that it has been laid down that the word "minerals" when used in a legal document or in an Act of Parliament, must be understood in its widest signification unless there be something in the context or in the nature of the case to control its meaning. I think myself bound by the authorities to give to the word when used in this Act its widest signification, and to hold that the council had power to pass the by-law in question.

A further objection taken to the by-law was, that in authorizing the granting of a lease of a portion of the

Judgment. highway itself, it was going beyond the power conferred by section 565, which authorizes only a lease of the right to take the minerals and not a lease of the highway itself. The lease which the by-law authorizes is certainly in form a lease of the highway, but it is expressed to be "for the purpose of boring for and taking therefrom oil, gas, or other minerals," &c. The by-law does not strictly follow the power given by the Act, but the practical difference in the present case seems to be so small that I do not think the by-law should be quashed on account of the excess. The quantity of land authorized to be taken appears from the evidence to be no more than is necessary for the carrying on the works, and would be necessarily exclusively occupied by them, and the right of public travel over the highway is protected and provided for. The objection would have been serious had the by-law provided for the leasing of any considerable piece of the highway.

The fact that the council insisted upon an indemnity against costs and damages is urged as a circumstance shewing that the by-law was not passed in the public interest, and should therefore be quashed, and *Peck and Corporation of Galt*, 46 U. C. R. 211, is cited in support of this contention.

The fact that an indemnity has been insisted upon by a council as a condition precedent to the passing of a by-law is undoubtedly a circumstance entitled to much weight where there is reason to suspect that they have acted otherwise than in the public interest in passing it; but it is by no means conclusive. The evidence here shews that a very wide-spread and perhaps exaggerated belief prevailed in the neighborhood of these wells as to the advantage likely to arise to the community from this discovery of gas. It is not difficult to suppose that the members of the council shared in the belief that the development of the discovery was of the highest importance to the community of which they were the representatives; but they appear to have entertained some doubts, which can hardly

be treated as unreasonable, as to whether or not natural gas was a mineral within the meaning of the statute, and finding the applicants for the by-law willing to give them an indemnity they took it and passed the by-law. I cannot find that they are to be blamed for having done so, there being nothing to shew that they did so for the purpose of shirking any proper enquiry or of consulting private interests.

Judgment.
Street, J.

The by-law must therefore, I think, be sustained upon all the grounds taken; and, being sustained, there appears to be no ground upon which the injunction can be continued.

I think it would be impossible to hold that the plaintiffs, by being the first persons to discover the reservoir of gas under their own land, can have acquired any right to restrain other persons from sinking wells upon their own lands for the purpose of reaching the portion of the reservoir which lies under them.

If the highway had been land upon which no one was entitled to put down such wells, it is possible that the plaintiffs might have been entitled to treat it as a belt of land protecting their well, and to have restrained its being used for an unlawful purpose; but, holding as I do, that the sinking of wells upon it is lawful, I am, I think, compelled to hold that the plaintiffs have no right to prevent its being used for that purpose.

The motion to set aside the by-law, and the motion to continue the injunction, must therefore both be dismissed with costs.

It is certainly a matter to be regretted that these two companies should be unable to arrive at a settlement of their differences when a settlement would appear to be manifestly advantageous to both. The plaintiffs' company are useless to the public, because although they have plenty of gas they have no money; the defendants company are useless to the public because they have money but no gas; it appears to be a very possible result of their refusal to agree, that in a short time neither company will have either gas or money.

[CHANCERY DIVISION.]

BOYD V. JOHNSTON.

*Vendor and purchaser—Exchange of lands—Lands subject to mortgage—
Liability of purchaser to pay,*

A purchaser of an equity of redemption is bound as between himself and his vendor to pay off the incumbrances, and this quite irrespective of the frame of the contract between the parties.

Where therefore lands were exchanged between the plaintiff and defendant which were subject to certain mortgages, the defendant was held bound to pay off those on the lands conveyed to him, and to protect the plaintiff from liability thereon.

Statement.

THIS was an action tried before BOYD, C., without a jury, at Barrie, at the Chancery Spring Sittings of 1890.

Walter Cassels, Q.C., and A. Skinner, for the plaintiff.

Pepler, Q.C., for the defendant.

An agreement was entered into between the plaintiff and the defendant for the exchange of land, and in pursuance thereof the plaintiff conveyed to the defendant part of lot 28 in the eighth concession of St. Vincent and the west half of lot 19 in the fifth concession of Euphrasia; and the defendant conveyed to the plaintiff the east half of the west half of lot 15 in the seventh concession of St. Vincent. The exchange was of the equities of redemption in the said lots, the lots being at the time incumbered by mortgages, namely, lot 28 by a mortgage of \$3050, the west half of lot 19 by a mortgage of \$450, and the east half of the west half of lot 15 by a mortgage of \$2600, the latter mortgage including another lot not forming part of the lands exchanged.

There was a dispute between the plaintiff and the defendant as to what took place when the agreement for the exchange was entered into as to the mortgages, the defendant claiming that the agreement was that he was to be exonerated from the payment of the mortgages on the lands conveyed to him by the plaintiff, whereas the plaintiff

claimed that the agreement was that the mortgages were to be assumed by the defendant. Statement.

The defendant put in evidence a release, subsequently drawn up by him, and which he procured the plaintiff to sign, exonerating the defendant from such payment. No consideration was shewn to have been given by the defendant to the plaintiff for the release, and the plaintiff stated that he did not understand its nature, and that it was the giving up of his right of indemnity.

The learned Chancellor reserved his decision and subsequently delivered the following judgment :

June 5th, 1890. BOYD, C. :—

The first Chancellor of the Court declared the rule of law applicable to this case in *Thompson v. Wilkes*, 5 Gr. 594, in these words ; “ It is clear that the purchaser of an equity of redemption is bound as between himself and his assignor to pay off the incumbrances, and that quite irrespective of the frame of the contract between the parties. * * The doctrine is not confined to mortgage transactions, which are but the particular instances of the application of the general rule that the purchaser of an estate subject to incumbrances is bound to indemnify the vendor against them, even though no covenant to that effect has been entered into ; and it does not proceed upon any technicality whatever, but upon clear principles of reason and justice.” p. 595.

The transaction in this case is manifested by the deeds of exchange, and by that from the plaintiff to defendant the land is conveyed subject to the mortgage for \$3,050 and \$450. As between plaintiff and defendant, therefore, it was the duty of the defendant to pay off these mortgages and thus protect the plaintiff from all liability thereon.

The passage I have cited shews that the form of dealing is not regarded. That answers what was so much discussed here as to whether the land was bought as the equity of redemption : it is not very material in this case to de-

Judgment.

C.

termine who is right; but I rather think that as the conveyance was of the land subject to the mortgages, the subject-matter really dealt with between these parties was the equity of redemption. There was no new contract made regarding the mortgages—that was left to be dealt with in the original contract between mortgagor and mortgagee. But the incident attached by law to this manner of dealing is, that the purchaser (subject to the mortgage) becomes surety to the seller for its payment.

The rule in question, which originated in a dictum of Lord Eldon in *Waring v. Ward*, 7 Ves. 332, was acted on in a late case before Huddleston, B., which is noted in the Solicitors' Journal of June 30, 1888, but I do not find it reported: *Ashby v. Jenner*, 32 Sol. J. 570, 576.

Proof was attempted of some understanding that the purchaser was to be exonerated from payment of these mortgages, but as against the deeds contemporaneously prepared by the solicitor of the parties, and the denial of the plaintiff, it would not be safe to detract from the effect of these conveyances.

There was then no consideration for the release by the plaintiff subsequently procured by the defendant. The plaintiff was thereby made to give up a valuable right of indemnification without consideration, which satisfies me that he did not appreciate or understand what he was doing. This being so, his right to relief is established, and judgment should pass in his favour as prayed, with costs.

[COMMON PLEAS DIVISION.]

REGINA V. CLARKE.

Intoxicating liquors—Liquor License Act, R. S. O. ch. 194, sec. 70—Selling liquor without license—Conviction—Imprisonment forthwith on non-payment of fine.

The defendant, being present in Court on a charge which was disposed of, was, without any summons having been issued, charged with another offence, namely, of selling liquor without a license. The information was read over to him, to which he pleaded not guilty, and evidence for the prosecution having been given, he thereupon asked for and obtained an enlargement till the next day, when, on his not appearing, he was convicted in his absence, and fined \$50 and costs, and in default of payment forthwith, without any distress having been directed, imprisonment was awarded :—

Held, that under the circumstances the issuing of a summons was waived. *Held*, also, that the conviction in awarding imprisonment in default of payment, was properly drawn, for by sec. 70 of R. S. O. ch. 194, under which the conviction was made, there is no power to direct distress.

THIS was a motion for the discharge, under a writ of *Statement. habeas corpus*, of the prisoner who was confined in the common gaol for the county of York, upon the grounds set out in the judgment.

June 17, 1890, *S. A. Jones* supported the motion.
Currie, contra.

June 23, 1890. MACMAHON, J. :—

The prisoner was convicted on the 27th of May, 1890, by two justices of the peace for the city of Toronto, (sitting in the absence of the police magistrate) for selling liquor without a license and fined \$50, and also the sum of \$2.55 for costs, and if not paid forthwith, imprisonment for three months.

The grounds upon which the defendant's release was asked were :

1. That no information or complaint was laid in writing against him as required by sec. 94 of the Liquor License Act, R. S. O. ch. 194.

2. That the conviction took place in his absence, and without a summons or warrant being issued requiring him to appear ; and

3. That the conviction is bad, because it awards impri-

Judgment. sonment, whereas a warrant of distress should have been
MacMahon, issued and a return made of no sufficient distress, before
J. awarding imprisonment.

From the affidavit of Inspector Archibald (the prosecutor in the case,) it appears an information in writing had been laid against the prisoner, and such information was read over to him and he pleaded "not guilty" to the charge. He was present in Court, and had been convicted on a charge of drunkenness, but discharged, it being a first offence of that kind; and Inspector Archibald says he told Clarke he might as well remain, as he had laid an information against him for selling liquor without a license, and that Clarke remained in Court, and after the evidence for the prosecution had been given, the prisoner asked for an enlargement until the following day to enable him to procure the attendance of witnesses for the defence, which was granted; but the prisoner not appearing on the following day, the conviction took place in his absence.

The prisoner having appeared and pleaded to the information, and asked and obtained an adjournment of the hearing waived the issuing of a summons which, after all, is only designed for bringing a defendant before the Court in order that he may plead to the information: *Regina v. Roe*, 16 O. R. 1, at p. 3.

Section 70 of R. S. O. ch. 194, under which the prisoner was convicted, makes no provision for distress in default of payment of the penalty and costs for a first offence.

Mr. Jones contended that the justices should have issued a warrant of distress before committing the prisoner to gaol. It is only in cases of first convictions under section 70, that magistrates are allowed to inflict, or a defendant is permitted to escape imprisonment by the payment of a money penalty; for a second or any subsequent offence the only penalty is that of imprisonment. It is, I think, clear that the magistrates could not have legally ordered distress. See *Regina v. Lynch*, 12 O. R. 372.

The motion for discharge must be refused, and the prisoner remanded to the custody of the keeper of the common gaol for the county of York.

[COMMON PLEAS DIVISION.]

McPHEE V. MCPHEE ET AL.

*Bills of exchange and promissory notes—Non-negotiable promissory note—
Endorsement of—Character in which endorsement is made.*

Where a non-negotiable promissory note, given for money lent to a firm, is made by one member thereof and endorsed by the other, the character in which the endorsement is made, will be implied from the purposes for which the note is given, the endorsement obtained, and the particular circumstances of the case, which were here held to make such indorser liable as guarantor.

THIS was an action tried before MACMAHON, J., without Statement. a jury, at Ottawa, at the Spring Assizes of 1890.

The defendants, who were brothers, carried on business in partnership, and the plaintiff, who was the wife of the defendant Alexander McPhee, had, during the existence of the partnership, lent the firm money amounting in the aggregate to the sum represented by the two promissory notes, set out in the statement of claim, which were given to the plaintiff by the defendants when she separated from her husband in 1882, and was leaving for Manitoba, as evidencing the amount of the indebtedness of the partnership to her.

The defendant Alexander McPhee did not appear to the writ, and judgment had been entered against him.

McVeity, for the plaintiff.

O'Gara, Q. C., for the defendant, E. Ronald McPhee.

June 29, 1890. MACMAHON, J.:—

The contest at the trial was in relation to the promissory note referred to in the two paragraphs of the statement of claim being a non-negotiable note made by the defendant Alexander McPhee, and on the back of which the defendant E. Ronald McPhee had indorsed his name. At the trial I allowed plaintiff's counsel to amend the statement of claim by alleging that by such indorse-

Judgment. ment the defendant E. Ronald McPhee had rendered him-
MacMahon, self liable to the plaintiff as a maker, or as a guarantor,
J. or as a surety for the maker, or on an account stated.

Where the defendant had the benefit of the plaintiff's money, the inclination should be to prevent an honest claim being defeated except upon clear legal grounds. So that if the defendant occupies towards the plaintiff any of the characters mentioned in the statement of claim, *i.e.*, as maker of a note, or as guarantor, or as surety for the maker, or as a party to an account stated, the plaintiff is entitled to recover.

On 14th February, 1888, the defendant, E. Ronald McFee, received notice of dishonour of the note.

Skilbeck v. Porter, 14 U. C. R. 430, was an action on a non-negotiable promissory note on which the defendants had endorsed their names, and the note was proved to have been given for money lent to the maker by the plaintiffs in the defendants' presence, and for which they had agreed to become security.

Robinson, C.J., in giving judgment, held that as there had been no dealings between the plaintiffs and defendants, by which the defendants had been otherwise liable, nothing to form the basis of an account, the endorsing of the defendants' names on the note did not supply evidence of an account stated in a transaction of that kind. And that learned Judge referred to *Gould v. Coombs*, 1 C. B. 543, as a case shewing where there have been dealings and transactions between the parties what will be regarded as evidence of an account stated between them.

I have not been able to find a decision in England or in our own Courts, where a person who has put his name on the back of a non-negotiable note has been sued as guarantor or surety for the maker. In the United States such cases have not been infrequent.

The inclination of the judicial mind in England is to hold that where a person puts his name on the back of such a note, evidence may be given outside the note itself to establish his liability as a maker.

In *Jackson v. Slipper*, 19 L. T. N. S. 640, the defendant had placed his name on the back of a non-negotiable promissory note, which had been signed in the usual way by another person as maker, and made payable to the plaintiff as payee. In an action by the payee against the defendant as joint maker of the note, it was held that the document of itself was not sufficient evidence of the defendant's intention to make him primarily liable upon the note as one of the makers.

Judgment.
MacMahon,
J.

Bovill, C.J., in giving judgment in that case, said: "By writing his name on the back the defendant did not intend to make himself primarily liable, and it becomes necessary therefore for the plaintiff to establish his liability as that of the maker by other evidence than that of the document itself."

In Randolph on Commercial Paper, vol. 2, sec. 830, it is said: "If a note so endorsed" (*i.e.* by one who is not a party to it) "at the time it is made, is non-negotiable, it is said that the indorsement must be a guarantee, since endorsement in its stricter sense applies only to negotiable instruments. And such endorser, as a guarantor, would not be entitled to formal presentment and notice of dishonour. In other cases, such an endorser has been held to be an original maker or guarantor, according to the intention of the parties; or to be a joint maker, and, as such not entitled to notice of dishonour; or at least presumptively a joint maker."

If the defendant can be regarded as a guarantor of the particular note sued on, presentment for payment was not necessary: *Hitchcock v. Humfrey*, 5 M. & G. 559; *Walton v. Mascall*, 13 M. & W. 452.

In *McMullen v. Rafferty*, 89 N. Y. R. 456 (1882) it was held that where one Hughes had executed and delivered to the plaintiff a non-negotiable note made payable on demand, upon the back of which the defendant had written his name, although the defendant did not in a commercial sense become an indorser, but could be treated by the plaintiff either as maker or guarantor, and in either

Judgment.
MacMahon.
J.

capacity the cause of action accrued against him immediately upon the execution of the note, and without demand.

In *Richards v. Warring*, 1 Keys 576, a decision of the Court of Appeal for New York, the head note is: "The indorser of a non-negotiable note is not entitled to notice of demand of, and of non-payment by the maker thereof. By indorsement before delivery, or before negotiating it, he may be treated as maker."

To the like effect is *Cromwell v. Hewitt*, 40 N. Y. R. 491.

In *Moffatt v. Rees*, 15 U. C. R., at p. 531, Robinson, C.J., in his judgment makes use of language applicable to the points involved in the consideration of this case: "It is implied by the Court and jury from the purposes for which the note was given and the indorsement obtained, shewing who was to be the person paid, and were the persons relied upon for paying, and shewing also that all the parties concerned knew these facts and the relation to which they severally stood, not in point of law only, but as regarded the understood liability to pay."

I have had some difficulty having regard to our statute R. S. O ch. 123. sec. 8, as to whether the endorsement can be considered simply as a guarantee, no words having been written over the defendant's signature shewing in what character he was endorsing this note. But my idea is that it is not requisite, to hold the defendant to be a guarantor, that the character in which he endorsed the note should precede his signature, and I am strengthened in this view by the remarks of Robinson, C.J., in *Skillbeck v. Porter*, 14 U. C. R. 430, at p. 433, already quoted, and by the cases cited from the American Reports.

There will be judgment for the plaintiff against the defendant E. Ronald McPhee for the sum of \$1,281.82, with full costs of suit.

Counsel for defendant abandoned the counter-claim at the trial, so there will be judgment for the plaintiff dismissing the counter-claim with costs.

[COMMON PLEAS DIVISION.]

THE TORONTO BELT LINE RAILWAY COMPANY V. LAUDER.

Railways and railway companies—Warrant for possession of land—R. S. O. ch. 170, sub-sec. 23, sec. 20.

The application for a warrant for possession of land required by a railway company under sub-sec. 23 of sec. 20 of R. S. O. ch. 170, should be made to the County Judge and not to a Judge of the High Court. Part I. of the R. S. C. ch. 109, does not apply to the applicants, a company incorporated under a local Act, 52 Vic. ch. 82 (O.), though under Dominion control, as being a railway for the general advantage of Canada, it being only applicable to railways constructed or to be constructed under the authority of a Dominion Act.

THIS was a motion for a writ of prohibition to the County Judge of the county of York to prohibit him from issuing a warrant of possession for certain land.

An application was made to the learned County Court Judge of York for a warrant of possession under sub-section 23 of section 20, R. S. O. ch. 170. This application was resisted upon the ground that "the Judge" referred to in such sub-section meant a Judge of the High Court, and not of the County Court.

The learned County Court Judge ruled against the objection, but stayed proceedings that this motion might be made.

June 24, 1890. *Delamere*, Q.C., for the motion.

Edgar, Q.C., contra.

June 28, 1890. ROSE, J. :—

I am of the opinion that the objection is not well taken.

Section 20 of R. S. O. ch. 170, provides for obtaining possession of the lands required for the purposes of the railway. It provides for notice to be served on the party interested which is to contain an offer of compensation. This sum may be accepted, when, upon payment or deposit of such sum in the manner provided by sub-section 23, the right to take possession immediately vests, and if opposition is made, then a warrant may be applied for.

Judgment.

Rose, J.

If the party interested is absent from the country or is unknown, the Judge of the County Court may order the publication of a notice: sub-sec. 3.

In such a case the sum may be accepted, and sub-section 23 applies as above. In any case, if the offer is not accepted, then "the Judge," *i.e.*, the Judge of the County Court, may appoint an arbitrator, and proceedings are taken to ascertain the value of the land, and on payment or deposit of the amount awarded, possession may be had under sub-section 23.

I cannot doubt that the Judge to whom application is made for the purpose of initiating proceedings, must be the Judge to whom application must be made to carry them into effect.

Then sub-sec. 4, recognizes that "the Judge" is the Judge of the County Court, for it provides for a Judge of the High Court acting when the Judge of the County Court is interested in the lands taken.

The references to the High Court and the Judges thereof, in the section, do not raise any doubt in my mind; and I think the objection fails.

But on the argument a further point was taken. The company was incorporated by ch. 82 of 52 Vic. (O.) It admittedly will be a connecting railway, thus bringing it under Dominion control, as a work for the general advantage of Canada. But it is argued that under *Re St. Catharines and Niagara Central R. W. Co. and Barbeau*, 15 O. R. 583, Part I. of the Dominion Act does not apply, the argument being that sec. 3 of ch. 109, the Dominion Railway Act, only makes applicable Part I. of that Act to "every railway constructed or to be constructed under the authority of any Act passed by the Parliament of Canada;" and that this railway is to be constructed, not under such authority, but under the authority of an Act of the Legislature of Ontario.

Certainly there is nothing in the language of section 3 as above referred to, to make applicable Part I. of ch. 109 to this railway.

On page 586 of the same volume is found a report of an application to my learned brother FERGUSON for an injunction restraining an application to the Judge of the County Court for a warrant of possession, which was granted.^(a)

Judgment

Rose, J.

The facts of that case were different in that that railway was governed by ch. 60 of 50 & 51 Vic. (D.), which applies to that railway alone. The real ground upon which the learned Judge seems to have decided, was that there was no sufficient notice given as provided by the Ontario Act.

Darling v. Midland R. W. Co., 11 P. R. 32, a decision of the learned Chancellor, was cited on the argument. It is also referred to by my brother FERGUSON, and seems to be a decision in the applicant's favour.

Clegg v. Grand Trunk R. W. Co., 10 O. R. 708, a decision of the Common Pleas Division in which I concurred, was referred to by my brother FERGUSON in *Barbeau v. St. Catharines and Niagara Central R. W. Co.*, 15 O. R. 586, at p. 592. While the general language there used seems also in the applicant's favour, I desire, for reasons hereinafter given, to have the decision in that case confined to the facts then before the Court.

I have come to the conclusion that Part I. does not refer to this railway, and that the provisions of ch. 170 do apply, and for the following reasons:

By sec 23 of 52 Vic. ch. 82, (O.), incorporating the company, it is declared that, "all the provisions of the Railway Act of Ontario except as varied by this Act, shall apply to the said company."

By sec. 3 of R. S. C., ch. 109, this railway is expressly excluded from the operation of Part I., as it is declared to apply to railways "constructed, or to be constructed, under the authority of any Act passed by the Parliament of Canada."

By sub-sec. 3 of sec. 3 the provisions of Part II. are made applicable to "all railway companies and railways

(a) *Barbeau v. St. Catharines and Niagara Central R. W. Co.*, 15 O. R. 586.

Judgment. *within the legislative authority of the Parliament of*
 Rose, J. *Canada, except Government railways."*

By sub-sec. 4 the provisions of secs. 107 to 119 are made applicable to "*all railway companies operating a line or lines of railway in Canada, whether otherwise within the legislative authority of the Parliament of Canada or not.*"

It seems clear that when certain sections are made applicable to *all* railways, certain others to all with specific exceptions, and the remaining sections to a still more limited class, the railways not included within such limited class are most expressly excluded.

But as if it was not to be doubted that Part I. did not apply to railways incorporated under Provincial Acts we find that it is enacted by sec. 116 that, "The provisions of sub-sections thirteen and fourteen of section six in Part I. of this Act shall also apply to every company incorporated under any Act of any Provincial Legislature in any case in which it is proposed that such railway shall *cross, intersect, join, or unite* with a railway under the legislative control of Canada."

If by sec. 121, which declares all "crossing railways" to be works for the general advantage of Canada, railways such as the one in question were brought under the provisions of Part I., sec. 116, would, so far as I can see, be quite idle and unnecessary. So far as I have observed this section has not been referred to in the previous cases.

Sub-secs. 13 and 14 of sec. 6 provide for crossing or uniting with other railways, and for the approval of the railway committee.

I am lead the more readily to this conclusion by the expressed opinion, or perhaps suggested opinion, of Osler, J.A., in *Bowen v. Canada Southern R.W. Co.*, 14 A. R. 1, at p. 10, where he says: "I will say that I am not convinced that the defendants are subject to Part I. of the Act. As to their main line and Welland and other branches they were incorporated by Ontario Acts, and although they are now subject to Dominion legislation alone, having been

declared to be a work for the general advantage of Canada, Judgment.
I do not concede that the provisions of their special Acts Rose, J.
are thereby necessarily superseded."

There can, it seems to me, be no doubt that any general legislation of the Dominion Parliament or legislation in terms sufficiently general to affect all railways, must apply to and govern this railway; but that, of course, cannot make applicable legislation which in terms excludes provincial railways.

And with such diversity of opinion, I think I am at liberty to act on my own view of the law.

I cannot prohibit the learned Judge unless I am clear he has not jurisdiction; and having come to the conclusion that he and he alone has jurisdiction, I must refuse the order.

The motion must be dismissed, with costs.

[COMMON PLEAS DIVISION.]

IN RE JOHN WESLEY PARKER.

Extradition—Junior Judge of County Court—R. S. C. ch. 142, sec. 5—Justices—Proof as to—State officers—Deposition taken in absence of accused—Identity of forged note—Power to remand for further evidence.

The expression, "all Judges, &c., of the County Court," contained in sec. 5 of the Extradition Act, R. S. C. ch. 142, includes the Junior Judge of said Court.

On a charge of forgery of a promissory note, alleged to have been committed in the State of Kansas, the justice before whom the depositions were made was certified to be a justice of the peace, with power to administer oaths :—

Held, that he was a magistrate or officer of a foreign state within sec. 10 of the Act; and also that it was not necessary that he should be a federal and not a state officer; and further that the depositions need not be taken in the presence of the accused.

The depositions failed to shew that the note, alleged to be forged, was produced and identified by the deponents or any of them :—

Held, that this constituted a valid ground for refusing extradition; and that there was no power to remand the accused to have further evidence taken before the extradition Judge as to such identification.

Statement.

The prisoner was committed by the Judge of the County Court of the county of Middlesex, for extradition, for forgery, committed in the state of Kansas.

A writ of *habeas corpus* was issued returnable before a Judge of the High Court in Chambers; and a writ of *certiorari* was also issued to bring up all the papers and proceedings before the said Judge.

On the return of the writs, the writs and return thereto were filed, and the discharge of the prisoner moved for on the grounds set out in the judgment.

May 20, 1890, *R. M. Meredith*, for prisoner.

Aylesworth, Q. C., and *McKillop*, contra.

May 20 1890. ROSE, J. :—

I think the objection that a junior Judge of the County Court is not embraced within the term "all Judges * * of the County Courts" in sec. 5 of R. S. C. ch. 142 fails.

If the argument were entitled to prevail, then under ch. 138, a junior Judge would not be entitled to either travelling or retiring allowance.

Judgment.
Rose, J.

The second objection was that there was no evidence of the forgery, the original note not having been produced to the deponents whose depositions were produced and acted upon or before the committing Judge.

Practically the only evidence taken before the learned Judge was to identify the prisoner, and though it was admitted that the note was in the possession of the witness examined for such purpose, he did not communicate the fact to the counsel for the prosecution, who supposed that it was not in Canada.

The depositions do not shew that the note was produced or shewn to the deponents, or any of them. On the contrary, it is quite consistent with their evidence, that a copy only was used at the time, and that they spoke from their recollection of a note seen at some former period; and I may say the language used is inconsistent with any witness then having the note before him at the time of his examination.

The evidence of one of the makers of the note, whose signature is admittedly genuine, was :

"I executed and delivered to one J. W. Parker, * * * my promissory note of that date, *of which the following is a true copy*," &c. * *
"I have *since the execution* and delivery of the said note seen and inspected the same, and that my father James Knight never signed the same," &c.

The holder of the note gave evidence

"That * * * said J. W. Parker sold and endorsed to me a promissory note of which the following is a true copy. * * That said note now is in the same condition," &c.

The language used in the several depositions is similar.

In Spears on the Law of Extradition, 3rd ed., p. 260, the case of *In re Faritz*, 7 Blatch. 345, is referred to, in which Judge Blatchford "held that when the charge is forgery, and whereby the deponents from abroad put in evidence under the Act of June 22, 1860, it appears by

Judgment.

Rose, J.

their depositions that the forged papers were produced to and deposed to by the witnesses giving the depositions, it is not necessary that the proper papers should be produced here before the commissioner." Such a case, as the Judge remarked, "stands precisely as if the witnesses had been examined in person before the commissioner, and the alleged forged papers had been produced to them before him."

In Clarke's Law of Extradition, 3rd ed., that learned author, at p. 213, speaking of the practice in the United States, says, "If the depositions shew that the documents alleged to have been forged have been produced to the deponent, such documents need not be produced before the magistrate."

It is of course beyond question that according to our law evidence would not be received in the absence of the document unless its absence were explained and foundation laid for secondary evidence.

In *Re Parker*, 9 P. R. 332, Mr. Justice Osler discharged the prisoner because the evidence was insufficient without the hearsay evidence appearing in the depositions.

In Clarke, at p. 218, it is stated that, "although by the English statute depositions may be received in lieu of oral testimony, the general English rules of evidence must be observed. Thus no hearsay evidence, no statements of the prisoner after threats or promises held out to him, could be received."

In my opinion the evidence before the learned Judge was not competent evidence to shew forgery, and the prisoner is entitled to his discharge unless there is power to set aside the commitment, and remand the prisoner back to custody that a further examination may be held upon the original warrant.

Upon such questions I will hear argument if the counsel for the prosecution think the power can be shewn to exist.

Reference may be had to Sir Edward Clarke's work at p. 214, where he states the practice in the United States to be as follows: "And if the commitment be set aside the

prisoner may be remanded back to custody, that a further examination may be held upon the original warrant of arrest."

Judgment.
Rose, J.

And see judgment of Wilson, C. J., in *Arscott v. Lilley*, 11 O. R. 153, at p. 161.

It will be noted that Sir Edward Clarke does not suggest that any similar practice exists in either England or Canada under the Acts regulating extradition proceedings.

I have not considered the question, as I have not heard argument upon it.

It becomes necessary to examine the remaining objections to see if any of them are valid for, if so, it will not be necessary to further consider the power to remand.

The third objection was, that the certificate of the Secretary of State showed that the justice of the peace before whom the depositions were taken had a civil jurisdiction only.

I think the fact does not so appear. He is certified to be a justice of the peace; and further, that he has certain powers which might be exercised in either civil or criminal matters, *i.e.*, "to administer oaths." As justice of the peace, he would be a "magistrate or officer of a foreign state" within sec. 10 of ch. 142.

The fourth objection was, that the certificate required by section 10 must be that of a federal and not a state officer. No authority was cited in support of such proposition, and I do not think it is the proper construction to be put upon the statute. See also *Re Lee*, 5 O. R. pp. 583, 591-3.

The words of section 10 are, as above quoted, and the interpretation clause, sec. 2 of the same Act, sub-sec. 10 (e) defines "foreign state" as including "every colony, dependency, and constituent part of the foreign state."

This objection, in my opinion, fails.

It was further objected that the depositions were not taken in support of any charge in the foreign state, but merely of the charge made in Canada.

With, I think, two exceptions this is not supported in

Judgment. fact; and, even as to the two depositions taken after the
Rose, J. charge here, they were in my opinion properly received.

In *Re Counhaye*, L.R. 8 Q.B. 410, at p. 416, Blackburn, J., said: "We are, I believe, also all agreed that section 14 makes depositions properly authenticated evidence in proceedings under the Act, whether they are taken in the particular charge or not, and whether taken in the presence of the person charged or not. In most European States, I believe, it is not the practice to take the depositions in the presence of the accused; at all events, the law is indifferent in the matter. I would add that it is for the magistrate to give what weight he thinks proper to depositions so taken." Sec. 14 is similar to sec. 10 of ch. 142.

This also disposes of the next objection, that the depositions were taken in the absence of the accused, and without notice.

I think there is nothing in the seventh objection, that the depositions do not shew forgery, if the evidence were otherwise competent or sufficient. McPheeter's evidence was particularly referred to by counsel for the accused. In my opinion the facts stated by him would have to be submitted to a jury, if the evidence had not been open to the objection I have given effect to.

The remaining objection (eighth) is that the learned Judge improperly refused evidence to shew that there was no forgery, and that the charge was the outcome of a conspiracy.

I think this objection untenable. Assuming that evidence had been given, which, if understood and believed, would warrant a finding of forgery—then even if conspiracy had been shewn—whatever that may mean in this case, or if evidence had been given raising a doubt as to whether the accused was guilty, the Judge could not have refused to commit, for it would make no matter what was the motive in prosecuting if the prosecution was well founded, so long as the evidence of a political charge was not raised, nor could the Judge have tried the question as to whether the accused was or was not guilty. See Clarke on Extradition, pp. 215, *et seq.*

If by Monday next, the counsel for the prosecution does not obtain an appointment to hear argument on the question of remand, the order will go for the discharge of the prisoner.

Judgment.

Rose, J.

June 30, 1890. In pursuance of my former judgment herein, I was attended by Mr. Shepley, Q. C., for the prisoner, and Mr. Aylesworth, Q. C., for the prosecution, who delivered very able and instructive arguments on the right or power to remand the prisoner for the purpose of the learned extradition Judge hearing further evidence as to the identity of the note.

I have considered the statutes and cases referred to.

No case has been found by counsel after careful search, where, either in extradition proceedings or proceedings in ordinary cases before a magistrate, a remand has been made for the purpose of opening the case to receive further evidence; and I am of the opinion that no such power exists, at least in extradition cases, which is all that it is necessary for me to decide in this case.

First, in such cases the authority to arrest and detain the prisoner, is only under the Extradition Act, no offence having been committed against the Queen's Peace. See *Re John Anderson*, 11 C. P. 1, and cases there cited—I may particularly refer to *Ex p. Besset*, 6 Q. B. 481, p. 61, judgment of Richards, J., and many other places in the judgments.

The authority conferred on the extradition Judge must be exercised in the manner pointed out by the statute, and thus is limited.

It seems to me to follow that the extradition Judge having brought the offender before him, heard the evidence, adjudicated, and committed him to prison, informed him of his right to apply for a writ of *habeas corpus*, and transmitted the evidence to the Minister of Justice, has completely discharged his duty, has finished his work, and is *functus officio*.

Can he then of his own motion, by reason of any inhe-

Judgment.

Rose, J.

rent jurisdiction, call the prisoner and the prosecuting and defending counsel before him, inform them that he has discovered that the committal has been on insufficient evidence, and open up the case to receive further evidence? Can he do so on the application of the prosecution? If so, where is the authority for the exercise of such power to be found? When first was it exercised? If such power exists how often may it be exercised? When can the accused know that the prosecution is closed and the evidence all in?

I considered in *McNabb v. Oppenheimer*, 11 P. R. 214, and *Re Doyle v. Henderson*, 12 P. R. 38, the limitation on the power of a judicial officer in civil cases to open up proceedings after judgment, and referred to some cases therein cited.

In criminal matters I see every reason for still greater strictness in limiting such power.

If the learned extradition Judge has no such power, then what power have I? I am not sitting as an extradition Judge, and, if I were, before I could hear any evidence, I must bring the accused before me, and proceed in the manner pointed out by the statute. But the Act confers no power on me to open up proceedings, and hear further evidence in aid of the committal, or to support a committal founded upon insufficient evidence, and so it confers on me no power to direct the learned extradition Judge to open up proceedings, and hear such evidence.

Nor can I conceive that I have any power under the *habeas corpus* proceedings. The case is not one within the ordinary jurisdiction of the Court. I have no original jurisdiction over it, and cannot institute or continue any proceedings save as I am by statute empowered. In this respect the case widely differs from one where the offence is against the Queen's Peace.

Then why should I remand? If I refuse to discharge what further is to be done? If no further evidence is to be taken, then is the accused to remain a prisoner on a committal unsupported by evidence? As a judge acting

on the return of the writ of *habeas corpus*, I must discharge the prisoner if no sufficient cause of committal or detention be shewn.

Judgm nt.

Rose, J.

I see no assistance to the application from the argument that there may be a remand to enable a proper warrant of committal to be made out. Admitting that such may be the case; I do not say it is the law, but assuming it to be so, there is a manifest distinction.

There would be a proper arrest and subsequent judgment of committal. The record would not be made out in accordance with the fact, and it would be only affording an opportunity to return a record of the fact as it really existed. The accused would properly be in custody. Nothing would have been done to entitle him to his discharge, and all the judge in the *habeas corpus* proceedings would do would be to say I do not discharge you, but remand you to enable a proper record to be made out. It may be that after return is made to the writ, it would be too late to obtain such an order. I do not say how that may be.

In *Re Warner*, 1 U. C. L. J. N. S., 16, HAGARTY, J., held that the jailer might return a valid commitment received before or after the receipt by him of the *habeas corpus*.

See also *Re Carmichael*, 1 U. C. L. J. N. S. 243, as to detention under a writ issued after discharge from custody under a prior defective commitment.

I think I am deciding according to the principles found in the cases to which I have referred.

The head note in *Ex p. Besset*, 6 Q. B. 481, is: "On *habeas corpus* and motion to discharge from such imprisonment for an offence committed abroad, the warrant being defective, the Court (assuming that they could look into the depositions referred to by the warrant) cannot on their own authority remand the prisoner as a person charged with a crime."

In *Re Anderson* the head note is, "Held also, that when a prisoner was brought before the Court upon a writ of *habeas corpus* under our statute, the warrant of commitment upon which he was detained, appearing on its face

Judgment.

Rose, J.

to be defective, the Court, before whom such prisoner was brought, had no authority to remand him, such power only being possessed by the Court at common law, and the prisoner not being charged with any offence for which he could be tried in this Province."

It will be observed that now there is no question about the power to look at the depositions. See *Regina v. Morton*, 19 C. P. 1.

In *Re Kermott*, 1 Chamb. Rep. 253, at p. 257, Sullivan, J., upon an application made by counsel for the prosecution to have the prisoner detained until more perfect evidence could be obtained against him from the United States, held that—without deciding the question whether the committing magistrate might properly detain upon evidence amounting only to a ground of suspicion for the purpose of other testimony being imported into the case so as to bring it within the treaty,—it would not be right for him to make any such order from the return of the writ of *certiorari* and *habeas corpus*; that it appeared to him that the prisoner was fully convicted upon insufficient evidence, and therefore was entitled to be discharged.

In *Regina v. Tubbee*, 1 P. R., 98, at p. 103, Macaulay, C.J., is reported to have said that he did not doubt the competency of the Judges "to hear additional evidence in further investigation of the case." The report is given in the third person, and may not be an accurate statement of the learned Judge's language. Moreover, there is no authority cited, and the observation is merely an *obiter*.

In *Re Lewis*, 6 P. R. 236, at p. 238, Gwynne, J., said: "*I might, I think*, properly remand the prisoner for the purpose of giving an opportunity to the prosecutor to produce properly certified copies of depositions."

His language, which I have italicised, shews that we have not even an opinion from the learned Judge, but merely the record of a passing thought, entitled however to every respect coming from so careful and able a lawyer.

Ex p. Krans, 1 B. & C. 258, was cited; but that was a recommittal under the ordinary jurisdiction of the Court,

it appearing that a crime had been committed, and that an investigation had not been made.

Judgment.

Rose, J.

On the other hand in *Re Timson*, L. R. 5 Ex. 257, it was said that "when a prisoner is brought up on a writ of *habeas corpus* and the return shews a commitment bad on the face of it, the Court will not, on the suggestion that the conviction is good, adjourn the case for the purpose of having the conviction brought up and amending the commitment by it."

As to power to recommit at the hearing in ordinary cases where the the warrant is defective, see *Church on Habeas Corpus*, p. 365.

In any event I do not feel justified in establishing a precedent, which many Judges, of far greater experience, having had the opportunity, have not made.

In my opinion the prisoner must be discharged.

It having been suggested on the argument that the prosecution desired to apply to the learned extradition Judge to issue further process, and desired an expression of opinion from me that would remove any hesitation on the part of that learned Judge to interfere out of respect to my judgment, I desire to say that if the prosecution can find any method according to law enabling the learned Judge to take other or further proceedings in the matter of the complaint, I am sure he will feel quite free to act.

[COMMON PLEAS DIVISION.]

REGINA V. DOWSLAY.

Justice of the peace—Procedure before—Proof of municipal by-law—R. S. O. ch. 184, sec. 289.

On the trial of a charge of being a transient trader without a license contrary to a municipal by-law, no copy thereof certified by the clerk to be a true copy, and under the corporate seal, as required by sec. 289 of R. S. O. ch. 184, was given in evidence. A by-law stated by the solicitor for the complainant to be the original by-law, was, however, read to the defendant in Court:—

Held, that the requirements of section 289 not having been complied with, the conviction was invalid, and must be quashed.

Statement.

THIS was a motion to quash the conviction of the defendant on a charge that he being a transient trader in the village of Delta, in the county of Leeds, did offer for sale and sell goods and merchandise without the license therefor by law required, contrary to a certain by-law of the municipality.

In Easter Sittings of the Divisional Court, June 21, 1890, (composed of GALT, C.J., and MACMAHON, J.,) *Aylesworth*, Q.C., supported the motion.

Marsh, Q.C., contra.

June 27, 1890. GALT, C.J. :—

There were several objections raised but it is only necessary to consider the first, *viz*: There was no proof before the said justices of the peace, at the time of the said charge, of the existence of the said by-law under which the conviction in question is alleged to have been made.

This is not disputed, so far as formal proof of the by-law is concerned. By sec. 289 of ch. 184, "A copy of any by-law written or printed without erasure or interlineation, and under the seal of the corporation, and certified to be a true copy by the clerk and by any member of the council, shall be deemed authentic." This was not done.

What took place, as stated by Mr. Lawson, who acted as solicitor for the complainant, is as follows: "That at the trial of such prosecution, the said by-law was in Court and portions of it were read to the said defendant, particularly that portion which related to the taking out of licenses and the penalty for not doing so." In an affidavit filed on this application, Mr. Lawson states, "I had the said original by-law with me in Court, and at the request of the said parties I read portions of the said by-law in the presence and hearing of said justice."

Judgment.

Galt, C.J.

It is manifest from the foregoing, that no copy of the said by-law authenticated in the manner provided by the Act was produced; and I fail to see how the justices of the peace could act on the production of a paper *not* by any officer of the municipality, but by the solicitor of the complainant, and alleged by him to be the original by-law, and it is not shewn that this paper was under the seal of the corporation.

This conviction will be quashed, with the usual order for the protection of the magistrate and of the informant; but as the latter had a pecuniary interest in the penalty, he must pay the costs of the defendant.

MACMAHON, J., concurred.

[COMMON PLEAS DIVISION.]

THE ATTORNEY-GENERAL, EX REL RICHARD HOBBS V. THE
NIAGARA FALLS WESLEY PARK AND CLIFTON TRAMWAY
COMPANY.*Injunction—Street railway—Operating on Sunday—R. S. O. ch. 171—
Right to restrain.*

The defendants, by letters patent issued under the Street Railway Act, R. S. O. ch. 171, were authorized to build and operate (on all days except Sundays) a street railway, &c. On an information laid to restrain the operating the railway on Sunday :—

Held, per GALT, C. J., that an information would not lie for the Act did not prohibit running cars on Sunday :—

Per ROSE, J., that the information would lie, for the authority to operate the railway “on all days except Sundays” implied a prohibition against working it on Sunday :—

Per MACMAHON, J., that the information would not lie, for no private right or right of property was involved nor any injury of a public nature done, and the interference of the Court will not be exercised merely to enforce performance of a moral duty.

Statement.

THIS was an action tried before MACMAHON, J., without a jury, at St. Catharines, at the Autumn Assizes for 1888.

The action was brought to obtain a perpetual injunction restraining the defendants from in any way operating their line and running their cars on Sunday.

The learned Judge delivered the following judgment, in which the facts are fully stated.

MACMAHON, J. :—

The defendant company is incorporated by Letters Patent under “The Street Railway Act, 1883,” (R. S. O. ch. 171), by which it was authorized to build and operate a street railway in the town of Niagara Falls and township of Stamford, and village of Niagara Falls in the county of Welland.

The 4th section of the Street Railway Act under which the defendants’ charter was granted, is as follows: “Such company shall, subject to any provisions contained in the charter or in its by-laws, have authority to construct,

maintain, complete, and operate (on all days except Sundays) * * a double or single iron railway * * for the passage of cars, carriages and other vehicles adapted to the same, upon and along such of the streets in any municipality to which its charter extend, as the council of the municipality may by by-law authorize; * * and to take, transport and carry passengers upon the same, by the force or power of animals, or by such other motive power as the company thinks proper, and as the municipal council authorizes; and to construct and maintain all necessary works, buildings, appliances and conveniences connected therewith."

Judgment.
MacMahon,
J

The charter was granted in the year 1886, and at the time the action was commenced had been in operation for over two years, during which period the company had been operating the railway on Sundays, carrying passengers between its termini. In his evidence, the informant, Rev. Richard Hobbs, states that the railway runs by Wesley Park, and that when religious services are held there, the people attending use the railway, and that some of the passenger traffic performed by the railway on Sundays would require to be done by hackmen. He (Hobbs) does not complain of any injury occasioned to his property by the railway being operated on Sundays. And neither in the statement of claim is it alleged, nor in the evidence is there the slightest proof furnished, that a public nuisance has been created by reason of the railway running its cars on that day.

It is admitted that the railway company was indicted at the General Sessions of the Peace for the county of Welland in June, 1888, for a violation of the Lord's Day Act.

The effect of what was urged before me on behalf of the company is, that this is not an action by a person asking that the railway be enjoined because of the infringing of a private right; and that it is only where some public interest is involved, or where there is a complaint that an injury of a public nature is being done, that the Attorney-

Judgment. General should interfere; and there was not even a scintilla of evidence showing injury to the public, or that the public interests required to be protected as against the acts of the defendants. It was also urged that the Court had no jurisdiction to enforce the performance of any moral duty except so far as the same is concerned with the rights of property.

MacMahon,
J.

By the Act under which the charter is granted to the company authority is given to operate its railway on any day except Sundays; and the argument is that there is a prohibition against the railway being operated on Sunday.

The argument of defendants' counsel is that this is a prohibition, the violation of which the Court will not restrain by injunction, because no rights of property are involved; and what is asked here is merely the enforcement of a moral obligation preventing the company from operating its railway on Sundays.

So far as the charter of the company is concerned it makes no difference whether the incorporation is effected by means of a special Act, or under a general Act.

Lord Justice James in *Attorney-General v. Great Eastern Railway Co.*, 11 Ch. D. 449, at p. 484, said: "And it is, in my judgment, to be considered, for the purposes of this action, that there is no real difference between a body of shareholders incorporated by special Act of Parliament for the purpose of making and working a railway, and a body of shareholders incorporated under the general law (now applicable to large associations) for the purpose of establishing and working any other industrial enterprise. So far as the first has compulsory powers it must not abuse them; so far as it has statutory duties it cannot delegate them; so far as it is under any statutory prohibition or direction it must not violate the one or neglect the other. But even in these cases it is only where some public mischief is done, or where, in respect of something intended for the public protection, there is misfeasance or non-feasance, that the Attorney-General ought to interfere."

The case of *Attorney General v. Shrewsbury (Kingsland)*

Bridge Co., 21 Ch. D. 752, was cited by the plaintiff to shew that the Attorney General can maintain an action on behalf of the public to restrain the commission of an act without adducing any evidence of actual injury to the public.

Judgment.
MacMahon,
J.

An examination of that case shows that what is meant as stated by Fry, J., at p. 757, is that there need be no evidence of any actual injury, but there must be evidence that the defendants were doing certain illegal acts, which tend in their nature to injure the public; and the illustration as to what is intended, is given in the head-note, "such as any interference with a public highway or a navigable stream."

Turner, L. J., in *Attorney-General v. Sheffield Gas Consumers Co.*, 3 DeG. M. & G. 304, at p. 320, said: "It is on the ground of injury to property that the jurisdiction of this Court must rest." And the same learned Judge in the case of *The Emperor of Austria v. Day and Kossuth*, 3 DeG. F. & J. 217, at p. 253, said: "I agree that the jurisdiction of this Court in a case of this nature rests upon injury to property actual or prospective, and that this Court has no jurisdiction to prevent the commission of acts which are merely criminal or merely illegal, and do not affect any rights of property."

The railway company are the owners of the track which, during the time the charter has to run, is vested in them; and what has been done was done in dealing with their own property; and it is because of their dealing with the railway in violation of the Lord's day or Sunday, the plaintiff asks for the intervention of the Court to restrain such use by the defendants of their property on that day.

The authorities are clear upon the question that the Court only exercises its jurisdiction in cases of the character stated where it is shewn that injury has been done; or that injury to property is threatened by the act of a defendant. What has been done by the defendants in running their cars on Sundays, may be illegal as a violation of the Lord's Day Act, and for such illegal act they may

Judgment be criminally liable ; but as what was done does not affect
MacMahon, proprietary rights, this Court is powerless to grant relief.
J.

The question for adjudication here, is put in a couple of short sentences in Kerr on Injunctions, 3rd ed., p. 5 : " The Court has no jurisdiction to restrain or prevent crime, or to enforce the performance of a moral duty, except so far as the same is concerned with the rights to property. * * But if an act which is criminal touches also the enjoyment of property, the Court has jurisdiction, but its interference is founded solely on the ground of injury to property."

It is not pretended there was any injury to the general public or to the property of the general public ; and it is only in such cases, as put by Lord Justice James in the passage already quoted : " Where some public mischief is done, or where in respect of something intended for the public protection there is misfeasance or non-feasance, that the Attorney-General ought to interfere."

In this case the public require no protection, because there has not, on the evidence in this case, been either misfeasance or non-feasance on the part of the defendants.

The defendants may be guilty of a violation of the Lord's Day Act—in respect to which I express no opinion—but the present action is not the means by which such violation can be punished.

The action will be dismissed with costs.

In Hilary Sittings, 1889, a motion was made to set aside the judgment entered for the defendants, and to enter judgment for the plaintiff.

In Hilary Sittings of the Divisional Court (composed of GALT, C. J., ROSE and MACMAHON, JJ.), February 8, 1890, W. M. Douglas, supported the motion. By the defendants' charter authority is granted to operate the railway on all days except Sundays. By thus excepting Sunday, it prohibits the working of the railway on that day. The working of the railway on Sunday is also a breach of the

Lord's Day Act, R. S. O. ch. 203. The object is to provide Argument.
for the peace and quiet of Sunday. It is also against public policy, as interfering with the rights of the public in the use of the highway, and it is not necessary to shew actual damage: *Attorney-General v. Great Eastern R. W. Co.*, 5 App. Cas. 473; *Attorney-General v. Cockermouth Local Board*, L. R. 18 Eq. 172; *Attorney-General v. Great Northern R. W. Co.*, 1 Dr. & Sm. 154; *Patterson v. Bowes*, 4 Gr. 170, 193; *Attorney-General v. Shrewsbury (Kingsland) Bridge Co.*, 21 Ch. D. 752; *Colman v. Eastern Counties R. W. Co.*, 10 Beav. 1; *Ware v. Regent's Canal Co.*, 3 DeG. & J. 212, 228; *Mayor, &c., of Liverpool v. Chorley Water Works Co.*, 2 DeG. M. & G. 852, 860; *Bonner v. Great Western R. W. Co.*, 24 Ch. D. 1; *United States v. Union Pacific R. W. Co.*, 98 U. S. 569, 571; Kerr on Injunctions, Black. ed., sec. 185, 531-2.

Hill, (of Niagara Falls) contra. The granting of injunctions in any case is a matter of discretion: *Doherty v. Allman*, 3 App. Cas. 709; Kerr on Injunctions, Black. ed., 170, 531. The Court will not interfere unless some private right is being infringed, or some public interest is involved, or there is a complaint that an injury of a public nature is being done, and their interference is necessary for the public good. The defendant's charter does not prohibit the running of trains on Sunday. It merely provides for the running of trains on other days. The running of trains on Sunday is an act outside of the charter, and so long as no rights of property are affected the Court will not interfere merely to enforce what may be deemed a moral obligation. There must be an interference with property or proprietary rights, and there is clearly nothing of the kind here. One of the principal uses of the railway on Sunday is carrying persons to and from Church. The majority of the people there desire that the railway should be run on Sunday.

Judgment. June 27, 1890. GALT, C. J. :—

Galt, C. J.

This action is brought to obtain a perpetual injunction to prevent the defendants from operating their line on Sunday.

By section 4 of R. S. O., ch. 171, (under which the defendants are incorporated,) "Every such company shall, subject to any provision contained in the charter, or in its by-laws, have authority to construct, maintain, complete and operate (on all days except Sundays)" their railway.

It is to restrain them from using their railway on Sunday this injunction is sought. It is to be observed there is no prohibition as to the use on Sunday; the effect of the statute is, that the provisions of the Act empower the company to use the railway on every day except Sunday; consequently, if they run their railway on Sunday and thereby commit a nuisance or an offence of any kind, they are not protected by the Act, but are liable; or, if by so doing, they injure any right of property they are liable; it might also be urged that they are not on Sundays entitled to claim the privileges conferred on them by the 6th section as respects other vehicles, but I do not see anything in the Act restraining them from using their railway on Sunday.

The cause of action, as stated in the statement of claim, is based entirely on the ground that by their charter and the Act of Parliament, the defendants are forbidden to operate their cars on Sunday—there is no allegation of any other ground; the charter was not produced at the trial; an abstract therefrom was read, and in this no reference is made to not running the railway on Sunday; but that is of no consequence, as unquestionably the charter must have been subject to the provisions under which it was issued; there is no allegation of any injury to property.

It appears to me the only question before us, is as to the construction of the Act of Parliament, for if the defendants are not prohibited from running their cars on Sunday, this

action must fail, as this is the only ground on which the plaintiff claims an injunction.

Judgment.

Galt, C.J

In my opinion, there is no such prohibition.

Under the circumstances, it is unnecessary to consider the question whether the Court has or has not jurisdiction to restrain by injunction what may be considered a breach of a moral duty where no injury to property is even alleged.

ROSE, J.:—

The facts are fully set out in the judgment of my learned brother MacMahon, by whom the case was tried,

In my opinion the authority to operate the railway “on all days except Sundays,” implies a prohibition against working on Sunday.

The fair meaning of such language appears to me to be that the company was granted its corporate powers on condition that it should operate its railway on six days only, *i.e.*, to say that it might operate its railway on all days except the seventh was but another form of words for saying that it might operate its railway on six days only.

If so the company was by the terms of its charter and the Act of Parliament under which the charter was granted prohibited from operating the railway on Sundays, and working on Sundays was in violation of the terms of the charter, and doing an illegal act; or, as put by James, L. J., in the case of the *Attorney-General v. Great Eastern R. W. Co.*, 11 Ch. D. 449, at p. 483: “Where a company entrusted with large powers is deliberately violating an express enactment, or disregarding an express prohibition of the Legislature, it is really committing a misdemeanor, and ought to be at once stopped.”

The case of *Ashbury Railway Carriage and Iron Co. v. Riche*, L. R. 7 H. L. 653, is referred to in *Attorney-General v. Great Eastern R. W. Co.*, L. R. 5 App. Cas. 473, at p. 481, by Lord Blackburn as follows: “That case appears

Judgment.

Rose, J.

to me to decide at all events this, that where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for a particular purpose, *what it does not expressly or impliedly authorize is to be taken to be prohibited*; and, consequently that the Great Eastern Company, created by Act of Parliament for the purpose of working a line of railway, is prohibited from doing anything that would not be within that purpose."

And, at p. 486, Lord Watson referring to the same case said: "That principle, in its application to the present case appears to me to be this, that when a railway company has been created for public purposes, the Legislature must be held *to have prohibited every act of the company which its incorporating statutes do not warrant either expressly or by fair implication.*"

Not only in my judgment does the Act in question prohibit by not warranting, but also prohibits by the use of language the fair meaning and effect of which include a prohibition.

If I am right in my first proposition it follows upon the authorities that the Attorney-General has the right to come to the Court and obtain an order restraining such prohibited and illegal act.

It is immaterial whether the proceeding is *ex officio* or on relation. See *Attorney-General v. Great Northern R. W. Co.*, 1 Dr. & Sm. 154, at p. 161, and *Attorney-General v. Great Eastern R. W. Co.*, 11 Ch. D. 449, at p. 500.

And it is not necessary in such a case to shew injury to the public or individuals.

During the argument in the case of *Attorney-General v. Great Eastern R. W. Co.*, 11 Ch. D. at p. 475, Baggallay L. J., said to counsel: "Assuming that the Act of Parliament prohibited the company from doing some particular thing, but they did it, and no injury arises either to individuals or the public generally in respect of what has been done, do you say that the Attorney-General in that case ought not to interfere?" To which counsel replied, "No; because it is to be assumed that the doing of an Act which

Parliament has prohibited, must be injurious to the public." Judgment
Rose, J.

In the same case, at p. 483, James, L. J., referring to the case of the *Attorney-General v. Great Western R. W. Co.*, L. R. 7 Ch. 767, where the company prohibited from opening its line until it was passed by an engineer, was restrained from disregarding such prohibition, said: "The company was, *of course*, restrained from this violation of an express compact with the Legislature."

I am not overlooking the limitation he places upon the duty of the Attorney-General to interfere, in the concluding words of his judgment, pp. 484, 5; but, taken in connection with the argument in the case and the citations I have made, it seems to me that he does not mean to cut down the force and effect of his previous language.

At p. 500, Baggallay, L. J., says: "It is the interest of the public that the law should in all respects be respected and observed, and if the law is transgressed or threatened to be transgressed, * * it is the duty of the Attorney-General to take the necessary steps to enforce it, nor does it make any difference whether he sues *ex officio*, or at the instance of relators."

And to the like effect, Bramwell, L. J., at p. 502: "I have no doubt, also, that if a thing is prohibited by the statute, creating a corporation, the doing of that thing is unlawful, and may be restrained. * * My doubt is, where there is *no* prohibition, and the act is not contrary to any duty towards or in violation of any right of the public," &c.

I also refer to the judgment of Jessel, M. R., in the same case, at p. 458, where he deals with the same question, and states what he deems in that case to be "against the public interest."

I do not see that the case of the *Attorney-General v. Shrewsbury (Kingsland) Bridge Co.*, 21 Ch. D. 752, is against this view. On the contrary I read it as in affirmance of it, assuming as I have here found, a prohibited act, and a presumption that the doing a prohibited act

Judgment.

Rose, J.

must be injurious to the public. I refer to the opinion of Lord Hatherley cited by Fry, J., at p. 756, from the judgment in *Attorney-General v. Ely, Haddenham and Sutton R. W. Co.*, L. R. 4 Ch. 194, 199: "The question is, whether what has been done has been done in accordance with the law; if not, the Attorney-General strictly represents the whole of the public in saying that the law shall be observed."

Even if it could be successfully argued that the act here complained of was not prohibited, it certainly would be against the terms of the contract, and that amounts in effect to the same thing. See the case above referred to of *Attorney-General v. Great Northern R. W. Co.*, 1 Dr. & Sm. 154.

I have not entered into the question of the prohibition being against running on the Lord's Day or Sunday. The day may have been and no doubt was excepted, because it was deemed to be in the public interest that the road should not be operated on that day; but my conclusion would have been the same had the excepted day or prohibited day been Monday or any other day of the week.

The applicants for the charter knew that it was granted on the express terms that Sunday should be excepted from the days on which it should be operated; and it seems to me a breach of good faith, having obtained the charter, to disregard its provisions.

In my opinion the motion must be allowed, and the perpetual injunction granted as prayed.

The company must pay all the costs. For a collection of the cases reference may be had to Kerr on Injunctions, 3rd ed., pp. 185, 531, 532. *Sparhawk v. Union Passenger R. W. Co.*, 54 Penn. 401, may be referred to as containing an interesting discussion of Sabbath observance.

MACMAHON, J.:—

I have had an opportunity of perusing the judgment of my learned brother Rose, dissenting from the view expressed in my judgment delivered after the trial. But I

have not been able to satisfy myself that I was in error in holding that no case had been made out for the interference of this Court to restrain by injunction the defendant company from running its trains on Sunday.

Judgment.

MacMahon,
J.

It is quite clear from the judgment of the House of Lords in the *Ashbury Railway Carriage and Iron Co. v. Riche*, L. R. 7 H. L. 653, and *Attorney General v. Great Eastern R. W. Co.*, 5 App. Cas. 473, at p. 481 : "That where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited."

Then what is the nature or character of the Acts committed by a corporation and not authorized by its charter for which it will be restrained by injunction at the instance of the Attorney-General ?

It will be necessary to consider the nature of the alleged prohibited acts for which corporations have been sought to be enjoined in the cases referred to in the judgment of my learned brother to see if any of them are authority for the proposition contended for by the relator, that the Court can by injunction, restrain a corporation where the illegal acts complained of have no tendency to injure property, or which do not in their nature tend to injure the public. And also that the Court can aid the enforcement of the criminal law by granting an injunction to restrain crime ; or, in like manner, enforce the performance of a moral duty.

Attorney-General v. Great Western R. W. Co., L. R. 7 Ch. 767, is referred to by James, L. J., in *Attorney-General v. Great Eastern R. W. Co.*, 11 Ch. D., at p. 483, where he said : "In the case of *Attorney-General v. Great Western R. W. Co.*, the railway company was prohibited by law from opening a line before it was passed by an engineer appointed by the Board of Trade, a provision intended for the safety of peoples' lives, and they were going to disregard that prohibition, and it was no answer for them to say that the line was safe, that no mischief could arise.

Judgment. The company was, of course, restrained from this violation of an express compact with the legislature.”
MacMahon,
J.

The judgment in that case is put expressly on the ground that it was *for the protection of the public*, that the Board of Trade should exercise its powers of causing a proper inspection before the line was allowed to be opened.

James, L. J., at the same page (483), summarises the case of *Attorney-General v. Cockermouth Local Board*, L. R. 18 Eq. 172, as follows: “The board were doing works which would or might probably poison a running stream, in direct violation of the law, which prohibited them *from committing a nuisance*. These seem to me to be good illustrations of the cases in which it is essential for the protection of the public and of individuals that the Attorney-General should interfere.”

He also points out, at pp. 483-4, that in *Attorney-General v. Great Northern R. W. Co.*, 1 Dr. & Sm. 154, at p. 161, Vice-Chancellor Kindersley, proceeded “on the ground that it was a matter of *grave damage and injury to the public*.”

What Kindersley, V. C., said in his judgment, was: “*Wherever the interests of the public are damnified*, by a company established for any particular purpose by Act of Parliament, acting illegally and in contravention of the powers conferred upon it, I conceive it is the function of the Attorney-General *to protect the interests of the public* by an information.”

In *Ashbury Railway Carriage and Iron Co. v. Riche*, L. R. 7 H. L. 653, at p. 672, the question raised was, whether the contract entered into was *ultra vires* of the corporation. It was held that the contract being beyond the objects of the memorandum of association, it was beyond the powers of the company to make the contract.

In *Attorney-General v. Great Eastern R. W. Co.*, 11 Ch. D. 449, where it was sought to restrain the Great Eastern Railway Company from leasing rolling stock to another railway company on the ground that such contract was under the Railway Clauses Consolidation Act, *ultra vires*, it was held by the Court of Appeal, (Baggallay,

J., dissenting) that such letting was not *ultra vires*; and, even if it had been, that no such case of public mischief was shewn as would entitle the Attorney General to interfere; the mere fact that a proceeding is *ultra vires*, not being sufficient for that purpose *unless injury to the public is shewn*.

Judgment.
MacMahon,
J.

The meaning which should be attributed to the language of Lord Justice James in that case must be gathered from all he said in relation to the point I am now considering. He said, at p. 482: "In my judgment, where the matter is a mere matter of *ultra vires*, that is, whether the managing partners of a concern are or are not doing something outside their charter, Act of Parliament, or deed of settlement, there ought to be some plain and sufficient public mischief shewn to warrant a suit on behalf of the Sovereign or the public."

And in a later clause in his judgment, at p. 484, he again deals with the question in the passage quoted by me in my former judgment: "And it is, in my judgment, to be considered, for the purpose of this action, that there is no real difference between a body of shareholders incorporated by special Act of Parliament for the purpose of making and working a railway, and a body of shareholders incorporated under the general law (now applicable to large associations) for the purpose of establishing and working any other industrial enterprise. So far as the first has compulsory powers it must not abuse them; so far as it has statutory duties it cannot delegate them; so far as it is under any statutory prohibition or direction it must not violate the one or neglect the other. But even in these cases it is only *where some public mischief is done, or where, in respect of something intended for the public protection, there is misfeasance or non-feasance*, that the Attorney-General ought to interfere."

This passage appears to have been inserted to prevent any misconception as to what meaning should be attached to any prior language in the judgment. It was in effect saying: Where a company is violating any express enact-

Judgment. ment, or disregarding any express prohibition whereby
 MacMahon, some public mischief is done, or where in respect of some-
 J. thing intended for the public protection there is misfeasance or non-feasance, then the Attorney-General ought to interfere.

When that case (*Attorney-General v. Great Eastern R. W. Co.*), was before the House of Lords Lord Blackburn referred to the point raised as to whether the case was one proper for the intervention of the Crown and said—5 App. Cas. at p. 485: “The second point, which is whether or not the case is a proper one for the Attorney-General to interfere in, and to what extent the powers of the Attorney-General in such cases go, is one I consider of great importance, and whenever it becomes necessary to decide that question I should desire to look into it very carefully, and to consider carefully what was the proper doctrine to be applied to such a case.”

See also the judgment of Lord Chancellor Truro, in *Attorney-General v. Birmingham, and Oxford Junction R. W. Co.*, 3 McN. & G. 453, at pp. 461-2.

In Morawetz on Corporations, 2nd ed., sec. 1041, it is said: “The fact that a corporation is about to exceed its chartered powers, or to commit any other unlawful act, is not alone a sufficient ground for the interference of chancery at the suit of a person who is not a member of the company. * * A court of chancery has no jurisdiction to issue an injunction, at the suit of the prosecuting officer of the State, to restrain a corporation from exceeding its chartered powers, or from doing acts otherwise illegal, *unless it be shewn that such acts are injurious to the public*, and that the remedy by injunction is required on equitable grounds. There is no reason why chancery should enjoin a corporation *from committing a breach of the law in any case in which similar relief would not be granted against an individual*. A court of equity has clearly no general jurisdiction to act as a conservator of the laws, or to enjoin the commission of crimes and misdemeanors, at the suit of the Attorney-General. It is

difficult to perceive then why equity should interfere to prevent a bare usurpation of corporate authority, or any other mere breach of the law, from being committed by an incorporated company." Judgment.
MacMahon,
J.

And, at section 1040, the same author says: "It is well settled that the courts of equity have no jurisdiction, unless it be conferred by statute, to decree dissolution of a corporation *by forfeiture of its franchises*, either at the suit of an individual, or at the suit of the State. The State alone can insist on a forfeiture of franchises, and the State has an adequate remedy at law, by *quo warranto*, to obtain a judgment of forfeiture and dissolution."

I adhere to my former opinion, and think the motion should be dismissed with costs.

[COMMON PLEAS DIVISION.]

HOWARTH V. KILGOUR.

Defamation—Libel—Letter partly libellous—Publication on privileged occasion—Malice.

The plaintiff and one S. had been in partnership, S. having retired and left the country. Subsequently the plaintiff made an assignment for the benefit of creditors. The defendant was a creditor and was appointed one of the inspectors of the estate. S. wrote a letter to one F. relative to the plaintiff's business, a portion of which the plaintiff claimed to be libellous, the remainder being admittedly privileged. F. forwarded the whole letter to the defendant who shewed it to his co-inspector, a creditor, and also to another creditor.

In an action against the defendant for the publication :—

Held, that the occasion of the publication was privileged, and that the privilege attached to the whole letter, it having been shewn only to persons equally interested with the defendant in the matter.

Statement.

THIS action was tried before STREET, J., and a jury at the Toronto Winter Assizes of 1890.

The plaintiff and one Montgomery Smith, had been in partnership in Toronto carrying on business under the name of the Howarth Paper Company. Montgomery Smith had retired from the partnership and gone to Indiana.

On the 4th of July, 1889, an assignment was made by the plaintiff Howarth of the estate and effects of the company for the benefit of creditors to Clarke, Barber & Co., the defendant being a creditor, and appointed one of the inspectors of the estate, and Mr. Gillean, manager of the Canada Paper Co., also creditors, being another of the inspectors.

Montgomery Smith on the 10th of July, wrote from Frankford, Indiana, to one Fisher, a letter which was forwarded to the defendant, containing the following passage : "What do you think of a man who would claim \$100 for setting fire to his own warehouse and take it, also pocket half the insurance money ? This is what Howarth did." The publication of which, by shewing the letter to Gillean the other inspector, to Mr. Gain a creditor, and to a Mr. Service, a former bookkeeper of the Howarth Company, who was a creditor (but whose claim against the estate

was a privileged one), was charged as the libel against the defendant. Statement.

On the occasion of shewing the letter to Service, he (Service) went to the defendant, and said Smith thought of making an offer for the estate, and the defendant said it was surprising Smith would make an offer after writing a letter like the one in question.

The whole of Smith's letter to Fisher was as follows:

"I have just received notice that the Howarth Paper Company have assigned, and being interested like yourself, I would like to give you a few pointers; if I can be of any use to the creditors interested, I am at their service. First, I will say that Howarth had no cause to fail except to make money, and tried to get me to join him in his dirty work. When I refused he went for me, and I came out \$3,750 short. This money went into his pocket. Now I am told Mrs. Howarth has a claim for money put in the business, which is wrong. She did not put in a cent; it is J. G. Howarth's money and put in in her name. I think you can easily set aside this claim and any other which is not genuine. Howarth has plenty of money to pay creditors in full, and I think, under the circumstances, it would be a pity to give this man a settlement less than 100 cents on the \$, as he has been scheming for some time. What do you think of a man who would claim \$100 for setting fire to his own warehouse and take it, also pocket half the insurance money? This is what Howarth did, besides other moneys disappeared out of the business which he alone can account for. This letter is open to others, and I enclose my address in case you wish to correspond on other matters."

Nothing turned upon the remainder of the evidence, the material portion thereof relating to publication by the defendant being already referred to.

At the close of the plaintiff's case the learned trial Judge, being of opinion, upon the authority of *Warren v. Warren*, 1 C. M. & R. 250, that the part of the letter shewn by the defendant to his co-creditors, was not privileged, it was agreed that judgment should be entered for the plaintiff for \$10, subject to the legal question to be argued on the motion to set aside the judgment.

The learned Judge thereupon directed that judgment be entered for the plaintiff for \$10 and full costs.

The defendant moved on notice to set aside the judgment entered for the plaintiff, and to have the judgment entered in his favour.

Argument.

In Easter Sittings of the Divisional Court (composed of GALT, C. J., and MACMAHON, J.), May 23, 1890, *Wallace Nesbitt* and *Roaf*, supported the motion. The communication was made by the defendant *bonâ fide* in a matter in which he had an interest, namely, the winding up of the estate, and it being a communication which had been received by the defendant from the plaintiff's late partner, it was the duty of the defendant to communicate it to parties who, like himself, were interested, and it was so only communicated, namely, to the inspector and creditors. The communication under these circumstances was clearly privileged, and the onus of proving malice is cast on the defendant, and he has failed to prove any. They referred to *Warren v. Warren*, 1 C. M. & R. 250; *Wilcocks v. Howell*, 5 O. R. 360; *Todd v. Dun*, 15 A. R. 85.

Joshua Denovan, contra. The defendant cannot avail himself of the doctrine of privilege, for the occasion was not privileged, the communication having being made to persons other than those interested. The *primâ facie* inference of malice was not removed, and judgment was therefore properly given for the plaintiff: *Colvin v. McKay*, 17 O. R. 212; *Spill v. Maule*, L. R. 4 Ex. 232; *Wells v. Lindop*, 14 O. R. 275, 279-80; *Dawkins v. Lord Paulet*, L. R. 5 Q. B. 94.

June 27, 1880. MACMAHON, J. :—

It was not contended that the other matters contained in the letter were not proper subjects for disclosure by the defendant to others having a common interest with him as creditors of the plaintiff's estate; and as to such matters a communication coming from a former partner of the plaintiff who represented his having an interest in the estate, it would be deemed a duty incumbent on the defendant as an inspector of the estate to inform the creditors of such other matters. If so, does the privilege attaching to the other subject-matters not also create a privilege as to the clause in the letter charged as being libellous? That is: was the defendant in the performance

of his duty as inspector in communicating with the creditors bound to prevent the clause forming the foundation for this action from being seen and read by them ?

Judgment.
MacMahon,
J.

Townshend on Libel, 4th ed., sec. 209, p. 300, in treating of communications made as a duty or supposed duty on the part of the person making them says: "Privileged communications comprehend all statements made *bonâ fide* in performance of a duty, or with a fair and reasonable purpose of protecting the interest of the person making them, or the interest of the person to whom they are made. A communication made *bonâ fide* upon any subject matter in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty, although it contain criminatory matter, which, without this privilege, would be slanderous and actionable."

In *Davies v. Snead*, L. R. 5 Q. B. 608, Blackburn, J., says, at p. 611, that: "Where a person is so situated that it becomes right in the interests of society that he should tell a third person certain facts, then if he *bonâ fide* and without malice does tell them it is a privileged communication."

This was held by Brett, J., in *Waller v. Loch*, 7 Q. B. D. 619, at p. 622, to be the true rule, as "it leaves out all misleading words, saying nothing about 'duty.'"

The position of the defendant in this case is similar to what would be that of the assignee of the estate who had received a communication warning him that the debtor had prior to his bankruptcy or insolvency been secreting his goods or disposing of them fraudulently, and that the money obtained from such fraudulent disposition was still retained by the insolvent debtor. The assignee in such case could not escape from the obligation he owed the creditors as their representative to disclose the information received, in order not only that their present interests might be protected, but to put them on their guard as to their future dealings with the insolvent debtor. The defendant as inspector having received this communication stands relatively in the like position as does the assignee to the creditors of the plaintiff's estate.

Judgment.

MacMahon,
J.

It is said that the performance of a duty is always compulsory; and that one cannot forego the performance thereof, because to omit the performance of a duty is to take away a right somewhere, either in society, or an individual, the right to have such duty performed: Townshend on Libel, sec. 39.

It would seriously cripple the actions of those entrusted either in the capacity of assignees or inspectors with the control over estates of debtors, and make the performance of the duties connected with such positions extremely hazardous were it to be held that it was not the province and the duty of a person, situated as the defendant was, to communicate the contents of a letter like Smith's to the creditors of the estate, and that he could only do so at the risk of being mulcted in damages for libel.

"In all these cases the duty referred to need not be one binding at law; any 'moral or social duty of imperfect obligation' will be sufficient. (Per Lord Campbell, in *Harrison v. Bush*, 5 E. & B. 344.) And it is sufficient that the defendant should honestly believe that he has a duty to perform in the matter, although it may turn out that the circumstances were not such as he reasonably concluded them to be: *Whiteley v. Adams*, 15 C. B. N. S. 392." Odger's Law of Libel, 2nd ed., 199.

In *Blayden v. Bennett*, 9 O. R. 593, the late Chief Justice Cameron, in his judgment, after citing a number of authorities on the question of privilege, says, at p. 601: "These observations seem to shew that though matters may clearly be defamatory if written or spoken by a person having an interest in the matter to one also interested, whether the interest be in connection with a public or private subject, the protection of privilege is thrown round the communication, and in the absence of malice an action will not lie in reference to such defamatory matter."

The communication having been made on a privileged occasion, rebuts the *prima facie* inference of malice arising from the publication, and throws upon the plaintiff the onus of proving malice in fact: *Wright v. Woodgate*, 2 C. M. & R. 573.

The case of *Warren v. Warren*, 1 C. M. & R. 250, relied upon by the plaintiff, does not assist us in determining the question involved in the present action. That case, which was an action brought against the writers of the libellous letter, merely decided that privilege attached to that portion of the letter written by the defendant to the manager in Scotland of property in which the plaintiff and defendant were jointly interested, as to the conduct of the plaintiff in reference to such property; but that privilege did not attach to a charge contained in such letter against the plaintiff with reference to his conduct to his mother and aunt.

Judgment.
MacMahon,
J.

In the judgment of the House of Lords in *Hamon v. Falle*, 4 App. Cas. 247, at p. 251, the following passage from *Toogood v. Spyring*, 1 C. M. & R. 181, 193, is cited as being still the rule in such cases as the present, "In general, an action lies for the malicious publication of statements which are false in fact, and injurious to the character of another (within the well-known limits as to verbal slander), and the law considers such publication as malicious, unless it is fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned."

Baron Parke, in *Toogood v. Spyring*, also makes use of the following language: "If fairly warranted by any reasonable decision or exigency, and honestly made, such communications are protected for the common convenience and welfare of society; and the law has not restricted the right to make them within any narrow limits."

See also *Coxhead v. Richards*, 2 C. B. 569; *Blackham v. Pugh*, 2 C. B. 611; *Tuson v. Evans*, 12 A. & E. 733; *Clarke v. Molyneux*, 3 Q.B.D. 237; *Todd v. Dun*, 15 A.R. 85.

The motion must be absolute to set aside the judgment directed to be entered for the plaintiff, and to enter judgment dismissing the plaintiff's action with costs—of course including the costs of the present motion.

GALT, C. J., concurred.

[COMMON PLEAS DIVISION.]

REGINA V. WATSON.

“Public Health Act,” R. S. O. ch. 205.—“Owner or agent”—Meaning of—Plumber.

By the 6th clause of a city by-law passed under the “Public Health Act,” R. S. O. ch. 205, it was provided that before proceeding to construct, reconstruct, or alter any portion of the drainage, ventilation, or water system of a dwelling house, &c., “the owner or his agent constructing the same” should file in the city engineer’s office an application for a permit therefor, which should be accompanied with a specification or abstract thereof, &c.; and by the 11th clause, that after the approval of such plan or specification no alteration or deviation therefrom would be allowed, except on the application of the “owner or of the agent of the owner” to the city engineer.

By sec. 22 of the “Public Health Act,” owner is defined as meaning the person, for the time being, receiving the rents of the lands on his own account, or as agent or trustee of any such person who would so receive the same if such lands and premises were let:—

Held, that the agent intended by the Act and coming within the terms of the by-law, meant a person acting for the owner as trustee, or in some such capacity, &c., and did not include a plumber employed by the owner to reconstruct the plumbing in his dwelling house.

Statement.

THIS was a motion to quash a conviction made by Hugh Milier, and R. J. Fleming, two justices of the peace, sitting in the absence of the police magistrate of the city of Toronto.

The conviction was under by-law No. 2238 of the city of Toronto, known as the “plumbing by-law” and imposed a fine of \$3 and costs on the defendant, because he did unlawfully construct a portion of the drainage, ventilation and water system of a dwelling house on MacDonald Avenue, owned by T. G. Ward, without first filing in the office of the city engineer an application for a permit therefor, contrary to said by-law.

The complainant was the inspector of plumbing for the city.

The defendant was a plumber, and the work performed was under a contract with Ward, the owner, who had not, nor had the defendant, filed an application or obtained a permit as required by the by-law.

The 6th clause of the by-law under which the conviction was had provided:

“Before proceeding to construct, re-construct or alter any portion of the drainage, ventilation or water system of a hotel, tenement, warehouse, dwelling house or other building, *the owner or his agent constructing the same shall file* in the office of the city engineer an application for a permit therefor, and such application shall be accompanied with a specification or abstract thereof in a blank form prescribed and supplied for this purpose, stating the nature of the work to be done, and giving the size, kind and and weight of all pipes, traps and fittings, together with a description of all closets and other fixtures, and a plan with the street and street numbers marked thereon and showing the drainage system underground.” Statement.

In Easter sittings, of the Divisional Court, (composed of GALT, C. J., and MACMAHON, J.), June 5, 1890, *T. W. Howard* supported the motion. The by-law is drawn up under the “Public Health Act,” R. S. O. ch. 205. The word “agent” means a person acting for the owner as trustee or in some such like capacity, and not a plumber called in to perform the plumbing work. See also clause 16 of the by-law contained in schedule “A” to the Act.

F. Mowat, contra. The term “agent” used in the by-law includes a plumber. The plumber is employed by the owner to draw the plans and to construct the drain and to do the work. He is the person on whom the owner relies that the work will be properly done and the requisites of the Act will be carried out, and certainly he is the proper person to be held chargeable with any breach in the carrying out of the terms of the Act. The conviction here is a valid conviction and should not be interfered with.

June 27, 1890. MACMAHON, J. :—

Unless the defendant can be considered the agent of the owner of the building, where the construction or re-construction, &c., is to take place, he cannot be convicted under this by-law.

What was urged by the counsel for the city was that the words “or his agent constructing the same,” mean that the plumber who is employed by the owner, should be considered as the agent of the latter for the purpose of

Judgment. filing the application for the permit together with a specification showing the nature of the work to be done, &c.
MacMahon, J.

The "Public Health Act," R. S. O. ch. 205, sec. 2, subsec. 1, defines the word "owner" as meaning "the person for the time being receiving the rent of the lands or premises * * whether on his own account or as agent or trustee of any other person, or who would so receive the same if such lands and premises were let."

Under the eleventh clause of the by-law:

"After a plan or specification has once been approved, no alteration or deviation from the same will be allowed except on a written application of the owner, or of the agent of the owner, to the city engineer."

Looking at the "Public Health Act," the by-law itself, and having regard to the reason of the thing, they are all against the contention that a man employed to do a job of plumbing to a dwelling or other building should be regarded as, or should be called upon to act compulsorily, as the agent of the owner of such building in preparing a specification, &c., and asking for a permit that the work might be done for the owner of the building.

The plans and specifications of a building—including the plumbing—may have been, and they generally are prepared, by an architect, and all the plumber has to do is to follow the plans and specifications in carrying out his contract, under the architect's supervision, who is the custodian of the plans, &c. Or, the plumber, instead of being a contractor to do that part of the work at a lump sum, may do it by day work. In none of these cases could it be possible to regard the plumber as agent of the owner for the purpose claimed.

The "agent" intended by the Act, must be a person acting for the owner as trustee, or in some such capacity in connection with the construction, re-construction, or alteration of drainage, &c., of any building. Where the owner is absent, and therefore cannot be reached, the agent who authorizes on his behalf the construction, &c., of the drainage &c., without a permit, is the person who must be prosecuted.

A in England has B as his agent in Toronto, who for his principal, the owner of property, is erecting a building, and contracts with C, a plumber, to construct the drainage, &c., of such building; it must be the agent of the owner of such building who is liable to be prosecuted in the event of application not being made for a permit under the by-law.

Judgment.
MacMahon,
J.

The conviction must be quashed, and I see no reason why the defendant should not have his costs from the informant.

There must be the usual order protecting the magistrates and officers.

GALT, C. J., concurred.

[COMMON PLEAS DIVISION].

BAKER V. FISHER.

*Sale of goods—Intention of purchaser to set off a claim against vendor—
Fraud.*

The plaintiff with the intention of parting with the possession and property in certain flour made an absolute sale of same, on apparently short terms of credit, to defendant, who withheld from plaintiff his intention to pay for the flour by setting up a claim he had acquired against the plaintiff :—

Held, that this did not constitute a fraud on the defendant's part so as to entitle the plaintiff to disaffirm the contract and replevy the flour.

Statement

The plaintiff, a merchant in Kingston, sold to the defendant, carrying on business in the same place, a quantity of flour and rolled oats at a price agreed on. The goods were delivered to the defendant and payment of the price demanded, but defendant set up that he had the right to set off against the price of the goods an account due by the plaintiff to a firm of Johnston & Barclay, which had been assigned to the defendant. The plaintiff claimed that the sale was for cash, and that as the defendant procured the said goods to be delivered to him with the design of not paying for them in cash, but of so setting off the said account, he was guilty of such a fraud as entitled the plaintiff to rescind the contract. A demand was made by the plaintiff for the goods, and on defendant's refusal to deliver same the plaintiff brought replevin therefor.

The action was tried before ARMOUR, C. J., and a jury, at Kingston, at the Spring Assizes of 1890.

At the close of the plaintiff's case the learned Chief Justice dispensed with the jury. He found that there had been a complete delivery of the goods, and a passing of the property therein, and that therefore replevin would not lie, and he entered a verdict for the defendant.

A motion was made on behalf of the plaintiff to set aside the judgment entered for the defendant, and to enter judgment for the plaintiff.

In Easter Sittings, of the Divisional Court (composed of Argument. GALT, C.J., and MACMAHON, J.,) May 30, 1890, *Smythe*, Q.C., supported the motion. The sale was for cash on delivery of the goods. The defendant withheld from the plaintiff the fraudulent intention that he did not intend to pay cash, and determined to get hold of the goods and then set off the claim due by the plaintiff to Johnston & Barclay. This constituted such a fraud as entitled the plaintiff to disaffirm the contract and replevy the goods. The contract was voidable *ab initio*, and therefore no property in the goods passed to the defendant. No man is bound by a bargain into which he has been induced to enter by a fraud, because assent is necessary to a valid contract, and there is no real assent when fraud and deception have been used as instruments to control the will and influence the assent. He referred to Kerr on Fraud, 2nd ed., p. 1; *Broderick v. Broderick*, 1 P. Wms. 239; Benjamin on Sales, 4th ed., p. 402; *Oswego Starch Factory v. Lendrum*, 57 Iowa 573; *Fair v. McIver*, 16 East 130; *Eland v. Karr*, 1 East 375; *Mayer v. Nias*, 1 Bing. 311; *Groom v. West*, 8 A. & E. 758, 761; *Load v. Green*, 15 M. & W. 216; *Earl of Bristol v. Wilsmore*, 1 B. & C. 514; *Davis v. McWhirter*, 40 U. C. R. 598; *Re Central Bank—Wells and McMurphy's Case*, 15 O. R. 611; *Wood v. McAlpine*, 1 O. R. 234, 242.

J. M. Machar, contra. There was a complete delivery of the goods and the property therein passed to the defendants. The plaintiff cannot shew a case in which it has been held that under circumstances similar to the present the plaintiff has been allowed to rescind the contract and replevy the goods. The cases cited by the other side are all cases of bankruptcy where rights of creditors intervened: *Eland v. Karr*, 1 East. 375.

June 27, 1890. MACMAHON, J.:—

Where the vendor has been induced to part with the possession and property in goods, by the fraudulent device of the vendee, the contract is voidable at the option of the

Judgment. vendor and he may sue in trover, and thus disaffirm the contract. Until disaffirmance the person having possession and property in the goods may part with them for valuable consideration when the election of the vendor to disaffirm will be too late.

MacMahon,
J.

There was an absolute sale in the present case and intention on the part of the plaintiff to part with the possession and property in the flour, &c., forming the subject matter of the contract. But what was contended by Dr. Smythe for the plaintiff was, that the wilfully withholding by the defendant of his intention to pay for the flour by setting up the claim of Johnston & Barclay against the purchase money, was such a fraud as entitled the plaintiff to disaffirm the contract, and replevy the flour, citing for this *Fair v. McIver*, 16 East 130.

That was a case where third persons holding the acceptance of a trader, who was known to be in bad circumstances, agreed with the defendants, as a mode of covering the amount of the bill, that it should be indorsed to them, and that they should purchase goods of the trader which were to be paid for by note at three months (before which time the trader's acceptance would be due) without communicating to the trader that they were the holders of the acceptance. The trader having become bankrupt, in an action by his assignee to recover the value of the goods sold and delivered to the defendants, it was held that as the debt claimed to be due by the bankrupt to the defendant was due to the latter not for his own benefit, but as trustee for another, the right of set-off did not exist. To allow a set-off under the circumstances would be against the policy of the bankrupt laws, as permitting a fraud upon the other creditors of the bankrupt. To the like effect is *Lackington v. Combes*, 6 Bing. N. C. 71.

Eland v. Karr, 1 East 375, was an action of assumpsit for goods sold and delivered, to which defendant pleaded a set-off of more money due to him from the plaintiff. Replication that the goods were agreed to be paid for in ready money; which was holden bad on demurrer being

no answer to the plea. The Court decided that as at *the time of the commencement of the plaintiff's action there was a debt due from the plaintiff to the defendant, the latter was entitled under the statute 2 Geo. II. to set it off.* Judgment.
MacMahon,
J.

The judgment in *Eland v. Karr*, 1 East 375, was followed in *Mayer v. Nias*, 1 Bing. 311, where the defendant who had ordered goods for ready money, paid for them by returning to the vendor's agent a bill accepted by the vendor which had been due and dishonoured before the goods were ordered; the agent at first refused to take the bill, but ultimately carried it home to the creditor, who retained it. The vendor having become bankrupt, his assignee brought an action to recover the value of the goods. It was held that the transaction was equivalent to payment, no fraud being established: which must mean that it was not established that the purchase was made with knowledge of the vendor's bad circumstances, and with the design of obtaining a fraudulent preference over the other creditors of the vendor, as was the case in *Fair v. McIver*.

In the case in hand, there was merely the price fixed at which the plaintiff agreed to sell, and defendant to buy, one hundred bags of flour; no time being mentioned for payment. It is true that after twenty-four bags had been delivered the plaintiff desired to obtain payment for that quantity, which the defendant refused; and upon the whole quantity being delivered wanted the defendant's note at five days for the agreement.

The plaintiffs had prior to the transaction in question other dealings in which the defendant purchased on short terms of credit, and in the present instance the plaintiff was willing to accept, and urged the defendant to give his promissory note for the amount of the purchase, shewing he was willing to extend to the defendant at least a short term of credit for payment of the purchase. After thus negotiating and dealing, it would be overturning all rules regarding contracts between vendor and purchaser, to hold that there was such fraud that the plaintiff could elect to disaffirm the contract and replevy the goods.

Judgment. It may be that the defendant has no legal right to set-off the claim or chose in action said to have been assigned to him by Johnston & Barclay. If he purchased it, it was subject to all the equities attaching to it in the hands of the assignors.

MacMahon,
J.

That, however, is not a matter we are called upon to deal with in the present motion.

There being—as found by the learned Chief Justice who tried this case—no fraud, the plaintiff's motion must be dismissed with costs.

GALT, C. J., concurred.

[COMMON PLEAS DIVISION.]

LAWSON V. ALLISTON.

Municipal corporations—Obstruction on highway—Digging well under R. S. O. ch. 184, sec. 489, sub-s. 42—Negligence—Contributory negligence

The defendants, for the purpose of sinking a well in one of the public streets of the village, to procure water for public purposes, under the power conferred by sec. 489 of the Municipal Act, had erected a derrick in the said street without placing a hoarding round it. The plaintiff had driven into the village past the derrick without its appearing to affect the horse, the derrick not then being at work, but on attempting to pass it on her way home, while the derrick was at work and making an unusual noise, the horse took fright and ran away, the plaintiff being thrown out of the carriage, and severely injured. The jury found that the derrick was of a nature to frighten horses, and that the defendants had not taken proper precautions to guard against accidents, and that there was no contributory negligence on the plaintiff's part:—*Held*, that the defendants were liable for the injury sustained by the plaintiff.

THIS was an action brought by the plaintiff to recover *Statement.* damages against the defendants, the municipal corporation of the village of Alliston, for an accident sustained by the plaintiff by reason of a horse she was driving taking fright at a derrick erected in one of the streets of the village for drilling a well for supplying water for the use of the village.

The evidence, so far as material, is set out in the judgment of MACMAHON, J.

The action was tried before Dean, J., Judge of the County Court of Victoria, sitting for Rose, J., and a jury, at Barrie, at the Spring Assizes of 1890.

The jury found for the plaintiff with \$1,500 damages, and judgment was entered in her favour.

The defendants moved on notice to set aside plaintiff's judgment and to enter judgment for them, or for a new trial, or to reduce the amount of the verdict.

In Easter Sitzings of the Divisional Court, (composed of GALT, C. J., and MACMAHON, J.), June 4, 1890, *Lount, Q.C.*, supported the motion. The defendants were rightfully on

Argument.

the highway doing work in the way ordinarily done for sinking wells of that kind, the work being done in the discharge of their duty, and for the benefit of the public, the well being sunk, and the machinery erected, for the purpose of obtaining a supply of water for fire protection. There was a sufficient part of the road left for the use of the public to travel on. To enable the plaintiff to succeed she should have shewn that there was negligence on the defendants' part, which she failed to do. The plaintiff moreover was guilty of contributory negligence. She knew of the derrick, in fact could only have avoided seeing it by shutting her eyes, and that it was of such a nature as would frighten a horse, and yet with such knowledge, she drove the horse, a spirited one, one which would likely take fright at such an object, past it; whereas she could have avoided it by driving along another road; and further, she was warned not to drive past it, but persisted in doing so; and also the evidence shews she was incapable of managing the horse: *Jones v. Grand Trunk R. W. Co.*, 16 A. R. 47; *Howe v. Hamilton and North Western R. W. Co.*, 3 A. R. 336; *Vars v. Grand Trunk R. W. Co.*, 23 C. P. 143.

J. A. McCarthy, contra. There was clearly evidence of negligence to go to the jury. It is not denied that the defendants were lawfully on the highway, but what the plaintiff claims is that they should have exercised care so as to guard against accidents. This could have been done either by closing up the street, putting up a hoarding around the derrick, or putting up a notice warning the public of the existence of the derrick. There was no evidence of contributory negligence on the plaintiff's part. The horse was a gentle one, and one which a lady could drive without any risk. The accident was not caused by the appearance of the derrick but in the working of it. The plaintiff had driven past the derrick in the forenoon without the horse being in the least frightened by it, and it was when driving home, while the machine was working, that the accident hap-

pened. The plaintiff had no reason to think that this ^{Argument.} would cause the horse to take fright, and as she only discovered the fact as she was driving past, she had no means of avoiding the happening of the accident : *Maw v. Townships of King and Albion*, 8 A. R. 248 ; *Gordon v. City of Belleville*, 15 O. R. 26 ; Smith on Negligence, Black ed., sec. 6 ; Shearman and Redfield on Negligence, 2nd ed., sec. 366 ; *Rounds v. Corporation of Stratford*, 26 C. P. 11.

June 27, 1890. MACMAHON, J.:—

The defendants, the municipal corporation of the village of Alliston were, under the provisions of sec. 489, sub-sec. 42, R. S. O. ch. 184, causing an Artesian well to be drilled and put down on the corner of one of the principal streets in the village, as a public well, and had contracted with one Hobson, who had sunk a number of such wells, for putting down the same.

From the evidence at the trial, it is difficult to describe the machine for drilling, and the manner of its working ; but from a photograph produced, and the explanation of counsel during the argument, I gather that the machine consists of a derrick about twenty-eight feet high, to the top of which a large hammer is raised by means of a windlass worked by horse power, and it is through the hammer dropping on the drill that the boring is carried on.

There is a side-walk ten or twelve feet wide on the street in front of an hotel called the "Revere House" and a few feet from the walk the excavation for the well had been made, the surface earth from the excavation being thrown towards the middle of the street, so that making an allowance for the side-walk on the opposite side of the street, would leave about thirty-five feet of unobstructed roadway for public travel.

The plaintiff and Miss Loblow had driven into Alliston in the morning and had passed the drilling machine which was not then working, and no notice of the machine was taken by Miss Loblow, who was driving, nor by the horse so far as the occupants of the vehicle could discern.

Judgment. After being in the village for a few hours shopping
MacMahon, they were returning home, and Miss Loblow and the
J. plaintiff were in the buggy, in front of a baker's shop, promising to remain there for a Mrs. Hipwell who intended making some purchases at the baker's and then purposed driving out with them. At this time the drilling machine was working, and it looked, according to plaintiff's evidence, so frightful, and made such a noise that she urged Miss Loblow to drive on at once and pass the machinery, so that the horse should not continue to see it while waiting for Mrs. Hipwell. Miss Loblow started the horse, which was then about 150 feet from the machine, and when nearly opposite the machine the horse shied, and becoming unmanageable bolted to the side of the street opposite to that upon which the machine was erected, overturned the buggy into the ditch, and injured the plaintiff's ankle so seriously that for many months she was unable to use her foot.

One of the principal grounds urged by the defendants and upon which they rely as entitling them to judgment is, that they were acting in the discharge of their duties as a corporate body in sinking the well for public purposes, the well being sunk and machinery erected to obtain a supply of water for fire protection for the village, and that the evidence shews there was a sufficient portion of the roadway left open for travelling purposes, and the case of *Howe v. Hamilton and North Western R. W. Co.*, 3 A. R. 336, was cited as shewing that where the corporation having the machinery rightfully in the highway were using it in the way ordinarily used for sinking wells of that kind, there was no evidence of negligence which should have been submitted to the jury.

In *Howe v. Hamilton and North Western R. W. Co.*, the corporation of the city of Hamilton had under R. S. O. (1877) ch. 165, sec. 21, allowed the defendants to run their railway along Ferguson Avenue in that city, and Howe who was driving along Barton street, which crossed Ferguson avenue on a level, found a freight train across

the street facing southward, and stopped his horse about 150 feet from it. A pilot engine came down to assist the train up grade to the south, but, the pilot being in want of firewood the train moved to the north to allow the pilot engine to go to the woodshed which was situated to the north of Barton street. The train had moved only to the other side of Barton street about fifteen or twenty feet when Howe attempted to cross, but the horse shied at the pilot engine which had remained stationary and Howe was thrown out and injured.

Judgment.

MacMahon,
J.

In the judgment of Burton, J., at p. 341-2, he discusses the legal position of a corporation having the right by Legislative authority to use the highway in relation to the rights of the general travelling public, as follows: "And they" (the railway company) "are bound so to use the privilege as not necessarily or unreasonably to interfere with those who have also a right to use the highway, and not to leave their locomotive or cars, when not in use for the actual working of the railway, upon the highway; but the Legislature having authorized the company to construct their railway upon the public streets without imposing upon them any express restrictions, or requiring any precautions against danger, must be held to have intended that persons who have to use the streets so used and crossed, should take the risk incident to that state of things, and we must be careful not to render the privilege accorded to them by the Legislature valueless by imposing upon them liabilities which it was not intended they should bear."

The defendants having lawful authority to use the road for the purpose of sinking the well, and to use the machinery necessary for that purpose, the question is: Was it negligence on the part of the corporation in permitting the derrick and machinery to remain on the highway without a hoarding around the same, when the working of a windlass and the falling of a hammer from a high elevation created unnatural noises and produced unnatural sights likely to frighten horses on the highway?

In *Howe v. Hamilton and North Western R. W. Co.*, as

Judgment.
MacMahon,
J.

stated in the judgment of Burton, J., at p. 342, there was no complaint "that the company has exhibited any want of care or skill in the running of its trains, or in the management of its locomotives, as by blowing off steam and thereby frightening the plaintiff" Howe's "horse, but by negligently and improperly leaving a locomotive upon the street when not in use." And the Court held, that negligence could not be imputed to the railway company for so leaving the locomotive.

While the machine was not in motion drilling the well it does not appear to have frightened the particular horse behind which the plaintiff was being driven on the day the accident occurred, because in passing into the village it was not noticed that the horse exhibited signs of fear or uneasiness at the mere sight of the derrick. It was while the machinery was in motion the horse became restive and unmanageable.

Under the powers given by the Municipal Act, the defendant corporation was carrying out that which the Act authorized in drilling the well, and if the damage to the plaintiff did not arise from any negligence in the use of the machinery by which the work was being done, the corporation should not be held liable.

The questions put by the learned trial Judge to the jury and their answers thereto are as follows:

"1st. Did the plaintiff act as a reasonable, careful person would do in driving past the machinery? Yes."

"2nd. Was the machinery such as a reasonable man might expect would frighten horses? Yes."

"3rd. If it was:—Did the defendants take such means as reasonable, careful men would take to prevent horses being frightened? No."

In Wharton on Negligence, section 835, it is said: "We have already when treating of casual connection, noticed that it is one of the incidents of the employment of horses on a highway that they should be frightened by extraordinary sights and sounds. Those who negligently and unnecessarily therefore place on a highway instruments

likely to cause such alarm are liable for the consequences if damages of this kind result"; citing *Hill v. New River Co.*, 9 B. & S. 303; *Judd v. Fargo*, 107 Mass. 261; *Jones v. Housatonic R. W. Co.*, 107 Mass. 261. Judgment.
MacMahon,
J.

The statement contained in the special case in *Hill v. New River Co.*, 9 B. & S. 303, is as follows: The New River Company in the exercise of the powers given them by the Act incorporating the company, caused a stream of water to spout up on a public highway to a height of about four feet from the level of the road in a place within the limits of the said Act. The jet of water was left open and unfenced and was likely to affright horses driven along the road. Whilst the plaintiff's carriage was being driven along the highway between the spouting stream and the ditch, the plaintiff's horses seeing the spouting stream were frightened by it, and swerving aside fell into the ditch, and the carriage and horses thereby suffered damage.

Mellor, J., gave the judgment of the Court, saying, at p. 305, there is no authority on the point reached by this case, but he thought the action was rightly brought against the New River Company since the spouting water was really the efficient cause, the *causa causans* of the accident; that but for the negligence of the defendants, the accident would not have happened, and that which they did may fairly be termed the proximate cause of the injury to the plaintiff.

Lush and Hannen, JJ., concurred.

In *Jones v. Housatonic R. W. Co.*, 107 Mass. 261, the defendants were held liable for injuries sustained by a traveller driving a horse upon a highway with due care, through a fright of the horse occasioned by a derrick which the corporation maintained, projecting over the highway so as naturally to frighten passing animals, although it was maintained for the purpose of loading and unloading freight on the cars.

Upon the ground of plaintiff's contributory negligence, numerous reasons are assigned by the defendants as disentitling her to recover, the principal reasons being: That

Judgment.
MacMahon,
J.

she knew of the location of the machinery yet took the risk of driving past; that she could have avoided the accident by driving along other streets; that she was warned not to ride past the machine but persisted in so doing and assumed the risk; that the evidence shews the driver was incapable of controlling the horse.

Miss Loblow who was driving the horse, it is urged by the defendants, should not have attempted to pass the machine if she was driving a horse she knew or supposed she was incapable of controlling; that is a horse known as not being a road-worthy horse, a horse easily frightened, and when frightened difficult to control, and requiring the strong arm and the vigilance and experience of a man accustomed to driving horses where there were unusual gatherings of people, to be able to successfully control an animal in passing a machine or obstacle of that character in the street.

The evidence relied upon by the defendants in support of the plaintiff's contributory negligence is that of William Loblow, the owner of the horse in question, who said at the trial:

“Q. You own this horse the young ladies were driving? A. I do.

Q. How long have you had him? A. About eighteen months.

Q. At that time? A. No, about eleven months.

Q. What age was the horse? A. About ten years old.

Q. Used to driving in single harness? A. Yes.

Q. And did you know the horse was taken out that day? A. I was not aware until after the accident.

Q. Your sister told us that she had never driven the horse alone before. Did you give any leave to take the horse? A. I lent the horse to my brother the day before.

Q. But not to your sister? A. No.

Q. Was the horse a horse for the sister to drive in that place? A. Well, I think she was.

Q. A gentle horse? A. Yes, gentle.

Q. Quite a safe horse to drive past this? A. I would not say she was a safe horse to drive past that.

Q. You would not consider the horse a horse for your sister to drive past that place? A. No.

Q. And your sister would not really have driven that horse by your permission if you had known it? A. She would, but not past that machinery.”

Mrs. Hipwell who owned the horse for five years prior to Loblow purchasing him, says she drove the horse more or less during her ownership, and that the horse was a fit horse for a lady to drive and had been driven by her niece for considerable distances without a bit being in its mouth.

Judgment.
MacMahon,
J.

The question of the contributory negligence was fairly left to the jury who found that the plaintiff did not act unreasonably, *i.e.*, she acted reasonably in driving past the machine.

It is no defence to the plaintiff's action that there was another available road which the plaintiff could, if she had chosen, have taken : Wharton on Negligence, 2nd ed., sec. 997, and cases there cited.

While agreeing that the plaintiff is entitled to recover, we consider the damages awarded as altogether excessive in view of the injury the plaintiff has sustained which was the spraining of her ankle, no doubt causing some pain for a time and disabling her from employment for at least eighteen months. She was during the period of her last employment receiving \$30 per month out of which she paid her board. After the accident the doctor's bill was for merely a nominal sum—a few dollars—and at the time of the trial, seven months after being injured, she was walking about with the aid of a cane.

If the plaintiff consents to reducing the damages to \$700 the motion will be dismissed with costs, including the costs of this motion ; and, if not, then there will be a new trial at the risk to her of the costs of the new trial in the event of her not recovering a sum in excess of \$700. The plaintiff to have fifteen days in which to make her election.

GALT, C. J., concurred.

COMMON PLEAS DIVISION.]

REGINA V. LYNCH.

Justice of the peace—Absence of police magistrate—Trial of offence under R.S.C. ch. 157—Alternative punishment—Imprisonment for more than 3 months—R.S.C. ch. 178.

By sub-s. 2, of sec. 8 of the R.S.C. ch. 157, any loose, idle, or disorderly person, or vagrant, shall upon summary conviction before two justices of the peace be deemed guilty of a misdemeanour, and liable to a fine not exceeding \$50, or to imprisonment not exceeding six months, or to both. By sec. 62 of R.S.C. ch. 178 the justices are authorized to issue a distress warrant for enforcing payment of a fine; and, if issued, to detain the defendant in custody, under sec. 62, until its return; and, if the return is "not sufficient distress," then to imprison for three months. Two justices of the peace for the city of Toronto, in the absence of the police magistrate for the said city, convicted the defendant for an offence under said Act, and imposed a fine of \$50, and, in default of payment forthwith, directed imprisonment for six months unless the fine were sooner paid:—

Held, that under the said sub-sec. the justices had jurisdiction to adjudicate in the matter; and that it was not necessary to consider the effect of an agreement entered into between the police magistrate and one of the justices to assist him in the trial of offences:—

Held, also that the conviction was bad, for under R.S.C. ch. 157 there was no power to award imprisonment as an alternative remedy for non-payment of the fine; while under R.S.C. ch. 178, imprisonment could only be awarded after a distress has been directed and default therein; and furthermore the imprisonment in such case could only be for three months.

Statement.

A writ of *habeas corpus* was obtained on behalf of the prisoner who was confined in the common gaol at Toronto, (but whose presence on the return of the writ was dispensed with), on a conviction made against him by John Baxter and Robert J. Fleming, two justices of the peace for the city of Toronto, for vagrancy.

A writ of *certiorari* was granted in aid of the *habeas corpus*.

Upon the return of the writs an order *nisi* was obtained to quash the conviction and to discharge the prisoner from custody, upon the grounds:

1. That the magistrate had no jurisdiction, as John Baxter, one of the convicting justices, had no right to sit as he was acting in his business capacity as a justice of the peace under an agreement for remuneration for his services.

received through the police magistrate of the city of Toronto. Statement.

2. That several offences were included in one conviction.

And 3, that the 2nd sub-sec. of sec. 8 of R. S. C. ch 157, under which the conviction took place, only authorizes the convicting justices to impose a fine not exceeding \$50, or imprisonment without hard labour for any term not exceeding six months, or to both ; whereas the conviction imposed a fine of \$50, and if said sum was not paid forthwith the defendant was ordered to be imprisoned in the common gaol at Toronto without any previous award of distress, for the space of six months, unless the same should be sooner paid.

The conviction was that " John Baxter and R. J. Fleming two justices of the peace for the city of Toronto acting in the absence of and at the request of George Taylor Denison Esquire, police magistrate in and for the city of Toronto, for that he the said James Lynch is a person, who not having visible means of maintaining himself, lives without employment, and thus is a loose, idle, and disorderly person and vagrant, within the Act respecting offences against public morals and public convenience," and a fine of \$50 was imposed, and, in default of payment forthwith, directed the said James Lynch to be imprisoned in the common gaol, and there kept for the space of six months unless the said sum should be sooner paid.

On the 15th January, 1890, the police magistrate, George Taylor Denison, wrote to John Baxter the following letter :

Under the statute, as you are aware, a justice can act for me at my request in all matters within the jurisdiction of a justice of the peace. The city council have placed at my disposal \$750 per annum to pay for such assistance as I may require to aid me with minor cases. I wish to know whether you would accept this sum of \$750 per annum and act at my request to try cases within your power as a justice of the peace. The remuneration I know is small, but the amount of work imposed on you will be light. One or two hours in the afternoon should usually suffice and give me more time for serious cases, it being understood that when a rush of work came on we should both work at high pressure in order to prevent such a state of affairs as we saw last summer, when for months the

Statement. congestion of business was such as to cause great hardship to suitors in the Court.

If you decide to accept this it will be necessary, as you will readily perceive, for you to resign from the council, as the pay will come through me but from it. I should like you to be ready to commence work by 1st February.

Please let me know your decision in the matter as soon as possible."

To this John Baxter replied :

"I have received your letter, and, having considered the matter carefully, have decided to accept the offer you have made me."

At the time the proceedings in this case were taken and conviction made the police magistrate was absent in England.

In Easter Sittings of the Divisional Court, (composed of GALT, C. J., and MACMAHON, J.) June 2, 1890, *DuVernet* supported the order. The convicting magistrate, John Baxter, had no jurisdiction to try the offence. Section 6 of the Act respecting police magistrates, R. S. O. ch. 72, provides that no justice of the peace shall "act in any case for a town or city where there is a police magistrate, except * * in the case of the illness, absence, or at the request of the police magistrate." The magistrate here did not come within any of the exceptions. His appointment was not merely to sit during the illness or absence of the police magistrate, but to assist the magistrate in disposing of business even though he might be present, and the meaning of "request" is, that there must be a request in each case and not a general request to act for him as here. The contract entered into between the police magistrate and the justice of the peace was illegal as the police magistrate had no power to appoint an assistant police magistrate, which is what the contract here amounted to ; and also the appointment amounted to a sale of an office, and was therefore void as opposed to public policy as well as to the statute of 5 & 6 Edw. VI., *Regina v. Mercer*, 17 U. C. R. 602. [The Court were of opinion that the justice of the peace had jurisdiction to act in this particular case. It was one in which two magistrates had jurisdiction under

sec. 8, sub-sec. 2 of the R. S. C. ch. 157. The Court ^{Argument.} expressed no opinion as to the legality of the contract entered into between the police magistrate and the magistrate John Baxter]. Then as to the conviction itself. It is for more than one offence: *Regina v. Gravelle*, 10 O. R. 735; *Regina v. Spain*, 18 O. R. 583. [The Court were of opinion that it was only for one offence, and overruled this objection.] The last objection is clearly fatal to the conviction as there is no power to award imprisonment as an alternative remedy for non-payment of the fine; and moreover imprisonment can only be for three months: *Regina v. Walker*, 7 O. R. 186; *Regina v. Bell*, 13 C. L. J. N. S. 200; *Regina v. Mackenzie*, 6 O. R. 165. Evidence was also improperly admitted of a previous conviction. The conviction should have been proved: *Regina v. Organ*, 11 P. R. 479.

Dymond, for the Attorney-General, contra. The only objections left to be answered are the third and fourth, namely, as to the alternative of punishment by imprisonment, and as to the admission of the prior conviction. If the Act authorizes a fine to be imposed, or imprisonment, or both, certainly the imprisonment can be awarded in the alternative, as this would be for the benefit of the defendant. The evidence of the former conviction was properly admitted.

Curry, for the magistrate, relied on the arguments put forth on behalf of the Attorney-General.

June 27, 1890. MACMAHON, J. :—

During the argument we disposed of the first and second grounds, holding they were untenable, for the reasons then stated.

As to the third ground. By the sub-section referred to (sub-sec. 2 of sec. 8) the magistrates have a wide discretion in inflicting a penalty upon conviction. They may fine only; or they may award imprisonment; or they may fine and imprison. But if there is the imposition by the

Judgment. magistrates of a fine only by way of penalty, the authority
MacMahon, of the justices does not extend to enable them to award
J. alternatively, that for non-payment of the fine, the defendant should be imprisoned.

There being by the Act under which the defendant was convicted no mode of raising or levying the penalty the justices are authorized by R. S. C. ch. 178, sec. 62 to issue a distress warrant for the purpose of enforcing the same ; and it is only after default of distress where a fine only is inflicted that imprisonment can be awarded: *Regina v. Walker*, 7 O. R. 186.

By sec. 65 of the above Act where a justice issues a distress warrant he may order the defendant to be detained in custody until the return of the warrant of distress.

Where the necessity exists for issuing a distress warrant under sec. 62, if the warrant is returned that no sufficient distress can be found, then under sec. 67 of the same Act the longest term of imprisonment for which the justices can commit a defendant is the period of three months.

The conviction in this case is therefore also bad upon the ground that the imprisonment awarded thereby is excessive.

In *Regina v. Bell*, 13 C. L. J. N. S. 200, a conviction for keeping a house of ill-fame, founded upon the same section of the Act as the conviction I am now considering, and where as in this case the justices imposed a fine, and directed imprisonment in default of payment, was by Harrison, C. J., held bad. See also in *Re Slater and Wells*, 9 U. C. L. J. 21.

In *Regina v. Mackenzie*, 6 O. R. 165, a conviction under the Indian Act, of 1880, (now R. S. C. ch. 43, sec 94) for giving intoxicating liquor to an Indian, imposed a fine and costs, and in default of immediate payment, imprisonment.

Section 94 of that Act provides as punishment for the offence, imprisonment, or fine, or fine and imprisonment ; and the conviction was therefore held bad by Mr. Justice Rose as the Act does not authorize a fine, and in default of payment, imprisonment.

On the third ground of objection taken, the conviction of the defendant is clearly bad, and must be quashed without costs, and the defendant discharged from custody.

Judgment
MacMahon,
J.

There will be the usual order for protection to the magistrate and officers.

GALT, C. J., concurred.

[CHANCERY DIVISION.]

ABELL V. MORRISON.

Registry Act—Actual notice—Imputed notice—Relief on ground of mistake—Subrogation—R. S. O. 1887, ch. 114, sec. 80.

The plaintiff registered a lien against certain lands. On the day before such registration the defendant, an intending purchaser, had searched the registry and found only two incumbrances registered against the property. Shortly after the defendant completed his purchase, and having paid off the two incumbrances, registered discharges thereof with his deed of purchase, but as he did not make a further search, he did not discover the plaintiff's lien :—

Held, affirming the decision of Falconbridge, J., that the defendant was entitled to stand in the place of the incumbrancers whom he had paid off, and to priority over the plaintiff's lien.

The Registry Act does not preclude inquiry as to whether there was knowledge in fact; and the Court was not compelled as a conclusion of law to say that the defendant had notice of what he was doing, and so could not plead mistake.

Brown v. McLean, 18 O. R. 533, specially considered.

THIS was an action brought to enforce a lien upon land under the following circumstances:

The defendant George Morrison, intending to purchase some lands of Margaret Morrison, his sister-in-law, searched the registry office on December 18th, 1887, and found that the only incumbrances registered against the land were two mortgages.

On December 19th, 1887, the plaintiff who had sold an engine to the husband of Margaret Morrison under a contract giving him a lien on the latter's lands, and also a lien upon the lands of Margaret Morrison, registered his lien against the lands in question.

Statement.

On December 24th, 1887, the defendant George Morrison without again searching the registry, paid off the prior mortgages out of money borrowed by him on a fresh mortgage of the lands, and accepted a deed of conveyance to himself, thus carrying out his purchase; and on the following day he registered the two discharges and his deed, and his subsequent mortgage.

The plaintiff now brought this action against Margaret Morrison, and her husband, and George Morrison, claiming that the effect of discharging the two prior mortgages was to let in his subsequent lien, which he now sought to enforce against the lands.

George Morrison defended the action denying that at the time of the sale to him of the lands in question he had any knowledge of the transaction between the plaintiff and his co-defendants, and claimed a declaration that the plaintiff stood in no better position than he did at the time when his (the plaintiff's) agreement with Margaret Morrison and her husband was registered, and that he was entitled to stand in the position of the encumbrancers whose claims he paid as between himself and the plaintiff, and entitled to all the priorities of the said encumbrancers.

The action was tried on November 30th, 1889, at Toronto, before FALCONBRIDGE, J.

Z. Lash, Q.C., and *Langton*, for the plaintiff.

McKay, for the defendant.

May 30th, 1890. FALCONBRIDGE, J.:—

I find the issue joined on the amended statement of defence in favour of the plaintiff.

The principal contest was as to George Morrison's claim to be subrogated to the rights of the encumbrancers whose claims he paid.

I find as a fact that at the time of the sale and conveyance to him he had no notice or knowledge of the agree-

ment between the plaintiff and the other defendants. I find ^{Judgment.} that he paid his money and discharged the prior mortgages ^{Falconbridge,} under the mistaken belief that he was getting a good title ^{J.} in fee simple unencumbered, and to adopt the language of my brother Street in *Brown v. McLean*, 18 O. R. 533, "that he is not disentitled to relief by reason of the fact that by using ordinary care" (in this case by a subsequent search in the Registry office) "he might have discovered the defendant's execution, because the defendant has not been in any way prejudiced by the mistake."

The defendant is entitled to a declaration that he is entitled as between the plaintiff and himself to stand in the position of the encumbrancers whose claims he paid.

I refer to *Brown v. McLean*, and cases there cited, and to *Hammond v. Barker*, 61 N. H. 53; *Smith v. Dinsmoor*, 119 Ill. 656. The Revised Statute of Illinois 1889, is similar to ours, p. 342, sec. 30: *Young v. Morgan*, 89 Ill. 199; *Fisher v. Spohn*, 4 C. L. T. 446.

If I had been obliged to hold that the plaintiff was entitled to priority, I would have endeavored to give effect to the counter-claim by treating the money paid by the defendant as paid for the plaintiff's use under a mistake of facts.

The defendant will have his costs of defence and counter-claim, and the plaintiff will have costs of the issue found in his favour.

The plaintiff now moved before the Divisional Court by way of appeal from the above judgment.

The motion came on for argument on June 21st, 1890, before BOYD, C., and ROBERTSON, J.

Langton,[¶]Q.C., for the plaintiff [after stating the facts.]
[BOYD, C.—Was not the case of *The Trust and Loan Co. v. Cuthbert*, 13 Gr. 412, one of the same kind?]

I submit not. The intention of the parties is manifest from the documents.

Argument.

[BOYD, C.—George Morrison does not, as he might have done, have the mortgages assigned to him.]

We say what was done was done according to their intention. Our rights are as they were left by the act of George Morrison. The money was Margaret Morrison's purchase money.

[BOYD, C.—She couldn't have controlled the money ; put it in her pocket and let the mortgages stand.]

Why should the person whom George Morrison's course of conduct has benefited, and who is an innocent party, not benefit by it ? There are cases shewing he should. *Brown v. McLean*, 18 O. R. 533, is the case of an execution. Where the registration of discharges is in the order in which they are here, the effect is to revest the property in the mortgagor. *Fisher v. Spohn*, 4 C. L. T. 446, is hard to understand. The discharge was held to increase the estate of the owner of the equity of redemption, not that of the person who had a charge as a judgment creditor. This is what in *Brown v. McLean*, STREET, J., disagreed with. In other words the discharge which the statute makes revest an estate in a particular person, may be moulded by the Court and made to vest the estate in whoever the Court might think should have it.

[BOYD, C.—You can't conceive that George Morrison intended to give you priority.]

He would not have gone into the transaction at all. I admit he had no actual notice, but in law he had notice.

[BOYD, C.—Cannot it be held that he had notice for all the purposes of the Registry Act ?]

The Act is for the purpose of giving parties the priorities they get in the registry office. His intention was to do what he did do, and he did it with the notice which the Registry Act gives him of our claim. George Morrison has his remedy under his covenant against incumbrances. That is all he can be taken to have intended to secure for himself. Whatever the American cases relied on by the learned Judge show, they are not law here : *Toulmin v. Steere*, 3 Mer. 210, at p. 224, is one of the earliest English cases.

This case has been held in subsequent cases to have gone ^{Argument.} somewhat too far, but the law appears to be found in *Adams v. Angell*, 5 Ch. D. 634. In both *Fisher v. Spohn*, and *Brown v. McLean*, the learned Judge proceeded solely on the ground of mistake, and the cases are based on that. In *Brown v. McLean*, the learned Judge relied on some cases I rely on : I also refer to *Watson v. Dowser*, 28 Gr. 478. No doubt we are not injured by the same amount remaining ahead of us that there was before, but that is no reason why we should not get any advantage which we properly can get. The American cases relied on are taken from Sheldon on Subrogation, and the passage on p. 2 shews they cannot be taken as safe guides for us : *Banta v. Garmo*, 1 Sandf. (N. Y. Ch.) 383 ; *Westfall v. Hintze*, 7 Abb. N. Cas. 236 ; *Sandford v. McLean*, 3 Paige 120. These shew that it is only when a person is in the position of a surety or some such position as that that subrogation applies. The cases in Illinois which will no doubt be referred to are not in harmony with those in other States. See also *Taylor v. Griswold*, 2 Greene Ch. R. (N. Jersey) 239 ; *Parry v. Wright*, 1 Sim. & Stu. 379. It is not said here that there was any mistake as to what the parties were doing. The mistake that there was no mortgage on the property whereas there was one is not such that it can be relieved against as against innocent parties. The three American cases on which the learned Judge relies all differ in some respects from this. In *Smith v. Dinsmoor*, there was some evidence of an intention on the part of the parties which the instruments did not carry out.

C. Moss, Q. C., contra. George Morrison mortgaged other property of his to raise money to pay off the prior mortgages. We do not dispute that the plaintiff is entitled to the priority which he had at the time of the payment off of those mortgages. If the hardships are to be looked at, there is nothing in favour of the plaintiff, who by being left to his present position is not injured. This case is almost on all fours with *Brown v. McLean*, 18 O. R. 533. The cases cannot be fairly distinguished. It is said that

Argument. by reason of the Registry law notice is to be imputed. But there is no more imputed notice than there is of writs in the sheriff's office. In either case the party if affected at all is affected in the same way. Street, J., points out that in cases when the effect of a mistake is not to put the other party in a prejudiced position, then the party making the mistake is not to be held to the consequences of the mistake in the same way as in other cases. As to the cases of which *Toulmin v. Steere*, 3 Mer. 210, and *Adams v. Angell*, 5 Ch. D. 634, are instances, these are not cases of purchases of the equity of redemption by one who was not a prior incumbrancer, but they are instances of the effect of the legal estate held by the mortgagee being vested in the holder of the equity of redemption. The law, as laid down in *Toulmin v. Steere*, did not apply to the owner of an equity of redemption, and it was so held in *Watts v. Symes*, 1 DeG. McN. & G. at p. 244. And in *Mayhew on Merger*, at p. 143, reference is made to these cases. There can be no doubt that if the mortgages had been conveyed to George Morrison himself, or to a trustee for him, there could have been no contention on the part of the plaintiff here. I submit the present position makes no difference. In *Howes v. Lee*, 17 Gr. 459, referred to by Street, J., a person was relieved, who acted very much as was done here. In *Hart v. McQuesten*, 22 Gr. 133, there is a full discussion of the whole law in regard to merger by the acquisition by the owner of the incumbrance of the equity of redemption, and reference is made in *Barker v. Eccles*, 18 Gr. 440, to the position of the subsequent incumbrancer, who, it is pointed out, is put in no worse position by his mortgage not being preferred. There is no reason for supposing that George Morrison had any desire to prefer this plaintiff, and that being so, there is no reason why the plaintiff should be held to have any better or superior equity to this defendant. The Illinois cases referred to by the learned Judge, are very strong in favour of this view. I submit that under the law of this country, a person paying money not for the benefit of the person claiming a benefit under

it, is to be held to have paid it only in that way: *Argument.* *Buchanan v. McMullen*, 25 Gr. 193; *Smith v. Drew*, 25 Gr. 188, and many other cases, lay down the same rule. A person making a payment is not to be held as making it for all purposes, but it may be held as made in the way most favourable to the ends of justice.

McKay, on same side. The evidence shews that if there was any negligence on either side, it was as much on the plaintiff's part as on the defendants. Here it is not the party who made the encumbrance who paid it off, as would appear to have been the case in the decisions cited on the other side. The Court should find some way of preventing the plaintiff gaining the unfair advantage he seeks.

Langton, in reply. In *Howes v. Lee*, 17 Gr. 459, the person who sought to eject was the mortgagor. Equity would not relieve him from the payment of his own encumbrance. I don't dispute the principle of that case. If there is an intention manifested not to discharge the mortgage that intention will be respected. But where there is no such intention, the merger takes place. Here there was no intention to the contrary. I refer to *Vance v. Cummings*, 13 Gr. 25.

June 30th, 1890. BOYD, C.:—

The decision in *Brown v. McLean*, 18 O. R. 533, followed in this case by Falconbridge, J., is one which rests on broad grounds of equity, of which many examples are to be found in the books. I may refer to the *Trust and Loan Co. v. Cuthbert*, 14 Gr. 410, where earlier cases are collected in the note. The great weight of American authority is in support of the judgment now in appeal as to which I may cite Pomeroy, *Equity Jurisprudence* Vol. 3, secs. 1211 and 1212, and in particular a case of *Cobb v. Dyer*, 69 Me. 494. Unless this case can be distinguished from that in 18 O. R., the judgment should be affirmed. Mr. Langton endeavoured to make a substantial distinction by contending that this being a registered title it must be held that the defen-

Judgment.

Boyd, C.

dant had as a fact notice of the plaintiff's lien which was registered on December 19th, 1887. The defendant searched the register for the purpose of purchasing on the day before, and carried out his purchase on the 21st December, the deed being registered next day, and also the discharges of the prior mortgages. The defendant did not mean to give priority to this lien of which he knew nothing in fact, and the strongest evidence of this is the fact of the mortgages being discharged instead of being assigned to accompany the title.

The mistake on which relief was granted in *Brown v. McLean*, arose from the failure to search for executions in the sheriff's office. The negligence was much greater there than here, where precaution was taken to make search, but not at the very last moment. The fault was comparatively venial, and if the relief was rightly administered in the earlier case, it was so here *a fortiori*. The Registry Act which declares (sec. 80) that registration shall constitute notice does not preclude enquiry as to whether there was knowledge in fact, and the Act itself (sec. 82) makes the distinction between actual notice and the implied or imputed notice which in certain cases flows from registration. I do not feel compelled as a conclusion of law to say that this defendant had notice of what he was doing, and so cannot plead mistake. He has proved mistake and has brought himself within the equitable doctrine which resuscitates the discharged mortgages for his advantage.

Judgment should in my opinion be affirmed with costs.

ROBERTSON, J., concurred.

A. H. F. L.

[QUEEN'S BENCH DIVISION.]

EDMONDS ET AL. V. HAMILTON PROVIDENT AND LOAN SOCIETY.

Mortgagor and mortgagee—Application of insurance moneys—Acceleration clause in mortgage—Election not to claim whole principal—R.S.O. ch. 102, sec. 4, sub-sec. 2—Interest, time of commencement—Mortgage account—Rectification of mortgage—Laches—Agreement—Local agent and appraiser, powers of—Wrongful sale under power in mortgage—Illegal distress—Measure of damages.

Upon a motion for an interim injunction the defendants filed an affidavit and statement shewing that they had applied insurance moneys received by them, in respect of loss by fire of buildings upon land mortgaged to them by the plaintiffs, upon overdue instalments of principal, and an insurance premium paid by them; and in their statement of defence they also stated their position in a way inconsistent with that which they afterwards took, viz., that the insurance money was applicable upon the whole principal, which, by virtue of an acceleration clause in the mortgage, had become due :—

Held, that the defendants had made their election, so far as the effect of the default and the application of the insurance money was concerned, not to claim the whole principal as having become due by reason of the default; and that they must apply the insurance money, as required by R. S. O. ch. 102, sec. 4, sub-sec. 2, upon arrears of principal and interest.

Corham v. Kingston, 17 O. R. 432, approved and followed.

Interest can be claimed by mortgagees only from the time the money is actually paid out by them.

Method of taking a mortgage account shewn.

Rectification of the mortgage deed as to the time of the first payment of principal was refused where it was sought by the mortgagors at a time when the payment in any event was long past due, and the mortgagees, without fraud, had acted upon the mortgage as executed, and without notice of the intention of the mortgagors to have the payment fixed for a later period; and where also there was really no agreement upon which to found the rectification, the defendants' local appraiser and agent to receive applications having no express or implied authority to make such agreements.

For wrongful proceedings under power of sale in a mortgage, illegal distress upon chattels, and consequent wrongs :—

Held, that the plaintiffs were entitled to recover more than their mere money loss.

THIS action was tried at the Picton Assizes, on April 23rd, Statement. 1890, before ARMOUR, C. J., without a jury. It was brought for the rectification of a mortgage from the plaintiff Leonard Edmonds, and his wife, the plaintiff Harriet Edmonds, to the defendants, and to recover damages owing to the plaintiffs' property having been illegally offered for sale, and their chattels unlawfully distrained by the defendants.

Statement. The defendants counter-claimed against these two plaintiffs for the amount secured by the mortgage in question.

The material facts shewn were as follows: On 13th June, 1887, the plaintiffs Leonard Edmonds and his wife applied to the defendants, in writing, for an advance of \$3,000 upon the security of certain property of the wife, situate in the township of Athol, repayable as follows:—\$100 on 1st December in each year, together with the interest on all principal due. Applicants to have the privilege of paying \$100 to \$500 with each payment in any year, to reduce principal; first payment to fall due on the 1st December, 1887. Upon the application was a notice that the mortgage would bear date on the first day of the month on which the application should be accepted, and that the payments must be made in accordance with the terms of the mortgage; also that the mortgage deed would be registered immediately after it was executed, but that the money would not be paid over until the title should be approved by the solicitor.

The application came before the defendants' board of directors on 14th June, 1887, and was indorsed by them as follows: "Agreed to lend \$2,700 for ten years at six and-a-half per cent., repaying \$100 yearly in reduction of principal, with the privilege of paying as high as \$400." Upon this a mortgage was drawn and sent by the solicitors for the company to the local appraiser for the company, one J. T. Brown, who had taken and forwarded the application.

A letter dated 23rd June, 1887, was then written by Brown to the company, in which he returned the mortgage to the company and asked them to correct it in some particulars. One of the objections was that by the terms of the mortgage as drawn (and so drawn in accordance with the application), the first instalment of principal was made payable on 1st December, 1887. Another objection was that the interest was made payable half-yearly, instead of yearly, which was not in accordance with the terms of the application. The solicitor on June 28th,

1887, sent to Brown a new mortgage in a letter, in which ^{Statement.} he said : " Re Edwards—I send you a new mortgage. The terms are, interest yearly on 1st December each year ; but the first payment of interest is to be on 1st December, 1887, and yearly thereafter ; mortgagor is to pay \$100 yearly on account of principal, and has the privilege of paying up to \$400 ; as soon as mortgage is executed, send it to the registrar and order abstract."

The terms of the mortgage as drawn by the solicitor were as follows : "\$2,700, with interest at six and-a-half per cent. per annum, payable yearly, and compound interest as hereinafter ; the said principal sum to be paid as follows : the whole sum then outstanding to be due and payable on 1st July, 1897, repaying in the meantime \$100 yearly in reduction thereof, with interest on all unpaid principal in the meantime, calculated from the first day of July, 1887, at the rate aforesaid, payable yearly on each first day of *July*, till the whole principal money and interest are paid ; the first of such payments of interest, amounting to \$87.75, to be paid on the first day of December, A. D. 1887 ; together with interest at the rate aforesaid upon all arrears of principal and interest, or either, from the accruing of such arrears until the date when the same are fully paid, whether said last named date shall be before or after the expiration of the mortgage term. Provided that in default of the payment of any portion of the money hereby secured, the whole principal and interest hereby secured shall become payable. The said mortgagors covenant with the said mortgagees that the mortgagors will insure the buildings on the said lands in the sum of not less than \$800 currency. The mortgagors do attorn to and become tenants at will to the mortgagees, at a rent equal in amount to the interest hereby reserved, payable at the times mentioned in the above proviso : Provided that the mortgagees may distrain for arrears of interest : Provided that the mortgagees may distrain for arrears of instalments : Provided that the mortgagees, on default of payment for one

Statement. month, may on two weeks' notice, or without any notice, enter on and lease or sell the said lands." There were, in addition to these, some ordinary and some special provisoes and conditions not affecting the present question. The mortgage was dated on 1st July, 1887. On receiving it, Brown took it to the mortgagors, who objected again to it, saying that they could not pay any part of the principal during the month of July, whereupon Brown, without further authority or consultation so far as appears, struck out the word "July," where it is last used in the terms of payment, and inserted the word "December" in its stead. He appeared also to have changed the figures \$87.75 to \$73.12; but that alteration did not become material. He then forwarded the mortgage, with these alterations, to the registry office, and it was transmitted thence to the solicitors, who made no objection to the alterations. The company had much difficulty in paying off the prior incumbrances and getting a satisfactory title. They paid off a lien held by the Waterous Engine Company on 26th September, 1888, which amounted to \$637 10

On 20th Dec., 1887, they paid C. S. Wilson	2,025 00
costs of Wallaceburg agent	10 00
cost of mortgagees' solicitors	31 90

Making a total of \$2,704 00

One of the cheques made payable to Wilson was drawn on 27th September, 1887, for \$1,200, and the other for \$825 was drawn on 8th November, 1887; but both remained in the possession of the company's agents until 20th December, 1887.

On 19th April, 1888, the company received \$48 from the plaintiff Leonard Edmonds, and sent him a receipt for it, with a statement as follows:

Instalment due December, 1887	\$143 87
Balance charges closing loan	4 00
Interest on arrears	4 00

\$151 87

Less paid as above and interest allowed..	77 25	Statement.
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Balance in arrears	\$74 62
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On 22nd June, 1888, the plaintiff sent the company a further sum of \$4, for which they sent him a receipt and statement as follows :

Balance of instalment due December, 1887 ..	\$74 62
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Interest in arrears	80
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	<u>\$75 42</u>
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Less paid as above	4 00
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	<u>\$71 42</u>
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On 19th November, 1888, they sent him a notice claiming \$73.10 as due for arrears, and notified him that unless the amount were paid before 1st December, 1888, they would take proceedings.

The company held an insurance upon the buildings in accordance with the covenant in the mortgage, and in December, 1888, some buildings were destroyed by fire. \$358 was paid by the insurance company to the defendants in respect of this loss, on the 8th January, 1889, out of which they deducted \$33 for the premium which they had paid ; and one of the principal questions in this action was whether the company should apply the balance of this insurance money upon the mortgage money generally, or upon the principal alone, or upon the arrears of interest as well as principal. It was said on the part of the plaintiff that he had intended to rebuild the buildings which had been destroyed, but had been discouraged by the company. The plaintiff was called in reply as to this, and stated that he told the defendants' inspector that he would put up just as good a building as was burned if the defendants would refund the insurance money, and that he replied that it did not make any difference whether the building were put up again or not ; that he did not want it there. In March, 1889, the defendants gave the plaintiffs notice of their intention to exercise the power of sale

Statement. in their mortgage; and in May, 1889, the property was offered for sale, but no bidders appeared. On 1st July, 1889, the defendants issued a warrant to one Buchanan, a bailiff, to distrain the goods of Harriet Jane Edmonds and Leonard Edmonds upon the lands in question for \$369, being part of the arrears due upon the mortgage above mentioned. On 2nd August, 1889, the bailiff seized some horses, cattle, implements, and crops upon the place, most of which were claimed by the plaintiff Leslie Edmonds, a son of the other plaintiffs, as his property.

The plaintiffs thereupon brought this action, and obtained *ex parte* an injunction to restrain the defendants from selling the goods seized, which was afterwards dissolved, and the goods were given up to them, upon their paying \$100 into Court to the credit of this action.

The learned Chief Justice reserved his decision, and afterwards, on 14th May, 1890, delivered the following judgment:

“The decision of the learned Chancellor in *Corham v. Kingston*, 17 O. R. 432, is binding upon me, and I must follow it; and following it, I find that at the time the defendants took proceedings for the sale of the mortgaged lands, and at the time they distrained for arrears of principal and interest, there was nothing in arrear upon their mortgage, either for principal or interest, and such proceedings and distress were therefore wholly illegal, wrongful, and unjustifiable. And I assess the damages sustained by the plaintiffs by reason of such illegal, wrongful, and unjustifiable proceedings and distress, at the sum of \$600, and I direct judgment to be entered for the plaintiffs against the defendants for that sum, with full costs of suit. And I direct that the defendants do pay to the plaintiffs the costs of and incidental to the proceedings for, and of and incidental to, the injunction herein; and I direct that the money paid into Court by the plaintiffs be paid out to them, with any accrued interest thereon. I have not distributed the damages assessed among the plaintiffs, but can do so if they desire it.”

The defendants, at the Easter Sittings of the Divisional ^{Argument.} Court, 1890, moved against this judgment, upon the ground that the evidence shewed that the plaintiffs Leonard Edmonds and Harriet, his wife, were in default at the time of the distress; that the mortgagees could not in any case be compelled to apply insurance moneys in payment of arrears of interest; that the damages assessed were excessive; and that the defendants were entitled to judgment against the mortgagors upon their counter-claim.

The motion was argued on 4th June, 1890, before the Divisional Court (FALCONBRIDGE and STREET, JJ.)

Crerar, Q. C., for the defendants. The whole of the mortgage money became due when an instalment was in default. The receipt of the insurance money could not deprive the defendants of the right to call for the whole of the money. If the insurance money was applied at all, it was applied on the whole sum, and not merely on arrears. The defendants had the right so to apply it if they chose: *Trust and Loan Co. v. Drennan*, 16 C. P. 321; R. S. O. ch. 102, sec. 4. But they never made any application of the money at all, and cannot now be obliged to apply it on the interest in arrear. In *Corham v. Kingston*, 17 O. R. 432, the mortgagees received the insurance money before anything was due upon the mortgage, and the money had to be applied on the instalments as they fell due. The damages awarded the plaintiffs are excessive. There was no special damage; no interruption in the enjoyment of the property.

P. C. Macnee, for the plaintiffs. The mortgage should be rectified according to the understanding and agreement of the parties. Nothing was actually advanced on the mortgage till the 20th December, 1887, and as the \$100 instalments were to be paid yearly, nothing would be due till the 20th December, 1888. The defendants did make an application of the money. By their statement put in on the motion for an interim injunction they shewed how

Argument.

they had applied the money, and gave the plaintiffs credit for \$125. When they assume to apply the money on principal not yet due, they vary the contract. I refer to R. S. O. ch. 107, sec. 5, sub-sec. 16; Con. Rule 359; *Corham v. Kingston*, 17 O. R. 432; Davidson's Precedents, vol. 2, part 2, p. 367; Jones on Mortgages, 3rd ed., secs. 409, 410. "Due" means "overdue." Am. and Eng. Cycl. of Law, vol. 6, p. 36. On the question of appropriation of payments, I refer to *Cromwell v. Brooklyn Fire Ins. Co.*, 44 N. Y. 42; *Gordon v. Ware Savings Bank*, 115 Mass. 588; Colebrook on Collateral Securities, p. 132; 38 Albany L. J., 188; 21 Central L. J. 473.

Crerar, in reply, referred to *Green v. Heward*, 21 C. P. 531; *Austin v. Story*, 10 Gr. 306.

June 27, 1890. The judgment of the Court was delivered by

STREET, J.:—

The original written proposal of the mortgagors to the defendants was that \$100 should be paid on account of the principal on 1st December in each year, and that the first payment of principal should come due on 1st December, 1887, being nearly six months after the date of the application. They say now that they did not intend this; that they intended the first payment to become due on 1st December, 1888. Upon their objecting to the terms of the mortgage as originally drawn, the solicitors for the defendants prepared and sent to Brown, their appraiser, another, which provided in effect that the interest should be paid annually on 1st December, commencing 1st December, 1887; and that the instalments of principal should become due on 1st July in each year, commencing 1st July, 1888. Brown took this to the mortgagors, and they again objected, saying that they could not pay anything in the summer. Thereupon Brown, without further communication with the solicitors, struck out the word "July" and sub-

stituted for it the word "December," intending, I suppose, to effect what the mortgagors proposed and desired, viz., that the first instalment of principal should not become due until 1st December, 1888. As altered by him, however, the result has been to make the first instalment of principal payable on the 1st December, 1887, instead of 1st December, 1888. In this form Brown forwarded the mortgage to the registry office, and in this form it remains to the present day. The defendants appear to have accepted the mortgage in its altered form, and to have acted upon it ever since in that form. The mortgagors now ask to have the mortgage reformed, so that it shall read as providing that the first payment of principal should become due on 1st December, 1888, instead of 1st December, 1887. I think the plaintiffs are too late in coming to ask for a rectification of the terms of the mortgage at this late date, in respect of a payment which, in any event, is long past due, when the mortgagees, without fraud, have acted upon the mortgage as executed, and without notice of the intention of the mortgagors in making the alteration. But if the objection of laches were out of the question, I can find nothing upon which to found a judgment for rectification. It is not attempted to be shewn that the defendants, or their solicitors, ever agreed, before the execution of the mortgage, to any terms but that the instalments of principal should commence on 1st July, 1888; nor that after the return of the mortgage to them in its altered form, they ever assented, or were asked to assent, to any alteration other than that shewn by the mortgage itself as altered, viz., that the instalments of principal should commence on 1st December, 1887, in accordance with the terms of the proposal; unless, therefore, it can be shewn that Brown, the appraiser, who agreed to the alteration postponing the first payment until 1st December, 1888, had authority to make such an agreement, the very foundation for a rectification of the writing, namely, an agreement between the parties, is wanting. There is no evidence of any such authority on his part; the course of

Judgment.
Street, J.

Judgment. business between him and the mortgagors must have
 Street, J. given them to understand that he was an agent only to
 receive applications, not to make agreements for the defen-
 dants; the mortgagors apply through him for a loan of
 \$3,000; he forwards the application, and the company
 agrees to lend only \$2,700; they object to the terms of the
 first mortgage sent for signature; he sends it back in order
 that a new one may be drawn, and then, for the first time,
 he undertakes to alter it. In the absence of any evidence
 of express authority on his part to make agreements to
 bind the company to any particular terms of payment, I
 think it clear that he must be treated as having no implied
 authority to make such agreements; and that the alleged
 verbal agreement between him and the mortgagors, which
 was never in fact put into writing, and never in any way
 communicated to or ratified by the defendants, should not
 be treated as affecting their rights.

Taking the mortgage then for the purposes of this action
 as it stands, as governing the rights of the parties, it is
 necessary to calculate the amount which was overdue upon
 it at the time of the seizure, in order to ascertain the actual
 position of the parties at the time the insurance money
 was paid, and also at the time of the seizure. The defen-
 dants, in my opinion, can claim interest only from the time
 the money was actually paid out by them. The account
 will I think stand thus:

	PRINCIPAL.	INTEREST.
Due 1st. Dec., 1887.....	\$100 00	
Interest on \$637.10 from 26th Sep., 1887, to 1st Dec., 1887		\$7 30
Interest on \$107.30 from 1st Dec., 1887, to 19th April, 1888		2 52
		<hr/>
		9 82
Cash paid 19th April, 1888		48 00
		<hr/>
	38 18 Bal.	38 18
	<hr/>	<hr/>

	PRINCIPAL.	INTEREST.	Judgment. Street, J.
Bal. prin. overdue 19th April, 1888.	61 82		
Interest on \$61.82 to 1st Dec., 1888.		2 40	
Principal due 1st Dec., 1888	100 00		
Interest on \$2032.90 from 20th Dec., 1887, to 1st Dec., 1888		125 00	
Interest on \$537.10 from 1st Dec., 1887, to 1st Dec., 1888		34 91	
Interest on \$324.13 (being \$161.82 + \$162.31) from 1st Dec., 1888, to Jan. 8, 1889, when insurance money paid		2 20	
	<hr/> \$161 82	<hr/> \$164 51	

So that at the time they received the insurance money, there was actually payable to them, under the terms of their mortgage, for principal \$161 82

And for interest 164 51

Total sum in arrear 8th January, 1889 . . . \$326 33

In addition to this, the defendants paid two insurance premiums : one of \$33, upon a date not shewn ; and the other of \$33.50, on 10th December, 1888, which was cancelled for some reason in April, 1889, and a rebate of \$21.34 of the premium was allowed. Assuming both these payments to have been made after 1st December, 1888 (and one of them certainly was), they would not become repayable to the defendants, under the terms of the Act respecting Short Forms of Mortgages, until 1st December, 1889, when the next instalment of interest became due, so that both of them should not, and perhaps neither of them should, be deducted from the \$358 insurance money received on 8th January, 1889. In one event, the balance left unpaid, after deducting the insurance money, would be \$1.33 ; in the other event, there would be a balance of the insurance money left in the hands of the mortgagees, after wiping out all the arrears. I think the onus of proof being upon the mortgagees to justify their dis-

Judgment. tress, we must treat them as having not shewn that the
Street, J. insurance moneys were insufficient to satisfy the arrears.

Upon the motion for injunction an affidavit and statement were filed on behalf of the defendants, purporting to shew in what manner they had applied the insurance money which they had received. In this statement they charged the mortgagors with the overdue instalments of principal and interest in separate columns, deducted the insurance money from the \$200 overdue principal, and brought down a balance of \$125 at the credit of the mortgagors in the "principal" column of the statement, and a balance of \$224 at the debit of the mortgagors in the "interest" column, after applying the \$48 and the \$4 paid, both on account of interest. They thus shew \$125 in their hands out of the insurance money which they have not applied at all.

In the face of this statement, I do not think they can now be allowed to say that the whole principal was overdue by the terms of the mortgage, because of the default in payment of the instalments; and that therefore they have the right to apply the insurance money upon the overdue principal and distrain for the overdue interest. They have made their election, so far as the effect of the default and the application of the insurance money is concerned, not to claim the whole principal as having become due by reason of the default. In the sixth paragraph of their statement of defence they state again their position in a way which is inconsistent with their present suggestion that the whole principal was then due.

Under the 4th sec. of ch. 102, R. S. O., "An Act respecting Mortgages of Real Estate," the rights of mortgagor and mortgagee are in certain respects defined with regard to the proceeds of insurances upon mortgaged buildings which have been destroyed by fire. By the 1st sub-sec. the mortgagee is entitled to require the mortgagor to apply any insurance moneys which he has received, in rebuilding; and by the 2nd sub-sec. a mortgagee may require that all money received on an insurance be applied in or

towards the discharge of the money *due under his mortgage*.

Judgment.

Street, J.

The result of these two sections seems to be that when a mortgagor receives insurance money he may be compelled by the mortgagee either to rebuild with it or to allow the mortgagee to receive it, at his option ; and that when a mortgagee receives insurance money himself, he has the right to apply it upon his mortgage.

In *Corham v. Kingston*, 17 O. R. 432, the Chancellor has construed the 2nd sub-sec. as compelling a mortgagee who applies it on his mortgage at all, to apply it first on overdue instalments, whether of principal or interest ; and I follow that construction. The result here is that the defendants, having received the insurance money, having declined to devote it to replacing the buildings which were burned, and having elected without any special stipulation to apply it on their mortgage, must apply it as the Act requires, viz., in payment of arrears. When so applied, it leaves no arrears, and the proceedings under the power of sale and by distress warrant were unauthorized and illegal.

The damages have been assessed by the learned Chief Justice at \$600. I think this is a somewhat larger sum than I should have put them at, but I am unable to say that it is excessive.

The mortgagors have had their farm offered for sale by the defendants at public auction when there was nothing due upon the mortgage. It is plain from the evidence that they have been put to great worry and annoyance ; their whole possessions have been illegally distrained ; they paid \$45 for possession money, and were obliged to raise \$100 by chattel mortgage to pay into Court, to prevent the sale of their chattels ; they were prevented by the proceedings under the power of sale from putting in some of their crops, owing to their uncertainty as to whether they would be allowed to reap them. It is evident that these are wrongs which entitle the plaintiffs to recover more than the mere money loss which they have given rise to : *Bayliss v. Fisher*, 7 Bing. 153 ; *Brewer v. Dew*,

Judgment. 11 M. & W. 625; *Doss v. Doss*, 14 L. T. N. S. 646. The
Street, J. \$600 damages should be apportioned as follows:

To the plaintiffs Leonard Edmonds and wife.. \$300

To the plaintiff Leslie Edmonds 300

\$600

The motion should be dismissed with costs, and judgment should be entered for the plaintiffs as above upon their claim with costs; and the counter-claim should be dismissed with costs.

[QUEEN'S BENCH DIVISION.]

REGINA V. MENARY.

Justice of the peace—Summary conviction—"Liquor License Act," R. S. O. ch. 194—Offence against sec. 49—Arrest in lieu of summons—Remand by one justice only—Powers of justices under sec. 70—Distress warrant—Imprisonment upon non-payment of fine and costs—Admission of no distress—Costs of conveying to gaol—Power to amend conviction—Evidence—Saving clause, sec. 105.

The defendant was convicted before two justices of the peace of selling liquor without a license, contrary to sec. 49 of the "Liquor License Act," R. S. O. ch. 194. A conviction was drawn up and filed with the clerk of the peace in which it was adjudged that the defendant should pay a fine and costs, and if they were not paid forthwith, then, inasmuch as it had been made to appear on the admission of the defendant that he had no goods whereon to levy the sums imposed by distress, that he should be imprisoned for three months unless these sums and the costs and charges of conveying him to gaol should be sooner paid. An amended conviction was afterwards drawn up and filed, from which the parts relating to distress and the costs of conveying to gaol were omitted. A warrant of commitment directed the gaoler to receive the defendant and imprison him for three months unless the said several sums and the costs of conveying him to gaol should be sooner paid.

Upon a motion to quash the convictions and warrant :—

Held, that the mode adopted for bringing the defendant before the justices was not a ground for quashing the conviction ; and *semble*, also, that it was not improper to arrest him instead of merely summoning him :—

Held, also, that the fact that the defendant was remanded by only one justice could not affect the conviction.

Semble, that the justices had no power under R. S. O. ch. 194, sec. 70, to issue a distress warrant or to make the imprisonment imposed dependent upon the payment of the fine and costs ; but as this objection was not taken by the defendant, no effect was given to it :—

Held, also, that the justices had the right to draw up and return an amended conviction in a proper case :—

Held, also, that if the justices were bound to issue a distress warrant, the insertion of the words relating to the admission of the defendant that he had no goods, was proper ; and if they had no power to issue a distress warrant, these words were mere surplusage and did not vitiate the conviction :—

Held, also, that if the justices had no power to require the costs of conveying him to gaol to be paid by the defendant, the conviction was amendable, as and when it was amended ; for the amendment was not of the adjudication of punishment :—

Held, lastly, that having regard to sec. 105 of R. S. O. ch. 194, and to the evidence before the justices, the convictions and warrant should not be quashed.

THE defendant was convicted at Brampton, in the county of Peel, of selling liquor without a license. Under a writ of certiorari the clerk of the peace of the county returned two convictions, the original conviction filed with him on

Statement.

the 9th of November, 1889, and an amended conviction filed with him on the 18th of November, 1889. The original conviction was as follows: "Be it remembered that on the 30th day of October, A.D. 1889, at the town of Brampton, in the county of Peel, William Menary is convicted before the undersigned two of Her Majesty's justices of the peace in and for the said county, for that he, the said William Menary, on the ninth day of October, A.D. 1889, at the township of Caledon, in the county of Peel, unlawfully did sell liquor by retail without the license therefor by law required (not being a sale under legal process, or for distress, or sale by assignee in insolvency), contrary to section 49 of the "Liquor License Act of Ontario," Joseph Foster, inspector of licenses, being the informant; and we adjudge the said William Menary for his said offence to forfeit and pay the sum of fifty dollars to be paid and applied according to law, and also to pay to the said Joseph Foster the sum of eight dollars and eighty cents for his costs in this behalf; and if the said several sums be not paid forthwith [then, inasmuch as it has now been made to appear to us, on the admission of the said William Menary, that the said William Menary has no goods or chattels whereon to levy the said several sums by distress] we adjudge the said William Menary to be imprisoned with hard labour in the common gaol for the county of Peel, at Brampton, in the said county, and there to be kept for the space of three months, unless the said sums [and the costs and charges of conveying the said William Menary to the said common gaol] shall be sooner paid."

The amended conviction was similar to the original, leaving out the words in brackets.

The warrant of commitment was also returned upon *habeas corpus*, which commanded the keeper of the said common gaol to receive the said William Menary into his custody in the said common gaol, there to imprison him at hard labour for the space of three months "unless the said several sums [and the costs of conveying him to the said common gaol,

amounting to the further sum of ——] shall be sooner paid Statement.
unto you the said keeper and for so doing this shall be your
sufficient warrant."

On the 21st day of December, 1889, *C. B. Jackes*, for the defendant, obtained an order *nisi* calling upon the convicting justices to shew cause why the convictions of the said William Menary and the warrant of commitment founded on the said convictions, or one of them, should not be quashed, on the following grounds:—

1. The arrest of the prisoner in the first instance was illegal, and a summons should have first been issued under the "Liquor License Act."

2. The warrant committing the prisoner was bad, because only signed by one magistrate.

3. Chapter 74, Revised Statutes of Ontario, sec. 1, is *ultra vires* because it seeks to apply the criminal law of Canada for the enforcement of a provincial statute.

4. Even if the said statute were *intra vires*, it could not apply until "a penalty or punishment is imposed"; none such was imposed in this case until after conviction, and the Dominion Statute could not be used before.

5. Sec. 103 of the "Liquor License Act" does not incorporate the Dominion Act, the "Summary Convictions Act," but only refers to the forms therein as guides.

6. The prisoner being so arrested and remanded was not legally before the justices and the whole proceedings afterwards were null and void.

7. No warrant of distress was issued and no evidence given to support the allegations of no distress in the convictions.

8. There are two convictions for the same offence on the same day, and on the same information and evidence, which is illegal, and it is impossible to say on which the warrant of commitment is founded.

9. Joseph Foster, the license inspector, was sworn, he being the informant, but his evidence was not taken down because it negatived the case for the prosecution.

Argument.

10. The justices refused to permit the prisoner to give evidence on his own behalf.

11. It does not appear that the prisoner was asked to plead to the charge.

12. There is no proper adjudication or minute of the convictions.

13. The convictions are bad, because they direct payment of the costs of conveying prisoner to gaol in addition to the penalty and costs of prosecution, and there is no evidence that prisoner did not come within sec. 49 of the "Liquor License Act."

14. The warrant of commitment is bad and does not correspond with form "I" of the "Liquor License Act," nor the convictions.

15. The said warrant is inimical because (a) it states prisoner is "on convicted" (b) before one of Her Majesty's Justices of the Peace, (d) it refers to "the Liquor Act," and there is no such Act; (e) it is bad because it commands detention of prisoner until payment of costs of his conveyance to gaol, (f) because it does not direct to whom the money is to be paid.

On the 4th June, 1890, *Langton*, Q. C., shewed cause and *Allan Cassels* supported the order *nisi*, before ARMOUR, C. J., and FALCONBRIDGE, J.

The following cases were referred to: *Reg. v. Ferris*, 18 O. R. 476; *Reg. v. Grant*, *ib.* 169; *Reg. v. Higgins*, *ib.* 148; *Reg. v. Elliott*, 12 O. R. 524; *Reg. v. Lynch*, *ib.* 372; *Reg. v. Cantillon*, 19 O. R. 197; *Reg. v. Flory*, 17 O. R. 715.

June 27, 1890. The judgment of the Court was delivered by

ARMOUR, C.J.:—

The mode adopted to bring the defendant before the justices is not a ground for quashing the conviction, but I

am far from saying that he was not properly brought before them. See R. S. O. ch. 74, sec. 1.

Judgment.
Armour, C. J.

Nor can the fact that the defendant was remanded by only one justice affect the conviction. See R. S. O. ch. 74, sec. 1, and R. S. C. ch. 178, sec. 6.

I doubt very much the power of the justices to issue a distress warrant under R. S. O. ch. 194, sec. 70, or to make the imprisonment thereby imposed dependent upon the payment of the fine and costs; and if it were necessary for me to determine this it would require further consideration.

It seems to me that their only power is to impose the fine thereby authorized, and in default of payment thereof to impose the alternative punishment of imprisonment, and that they have no power to issue a distress warrant or to make the imprisonment dependent upon the payment of the fine and costs.

If the fine is ordered to be paid forthwith, as in this case, and it is not so paid, there is then the default in payment which calls for the alternative punishment of imprisonment under that section.

There was only one offence, and it is plain that there was only one conviction for the offence.

The first conviction drawn up and returned to the clerk of the peace being thought to be erroneous, the justices drew up and returned an amended one, as they had the right, provided the facts before them justified it, to do.

If the justices were bound to issue a distress warrant, the insertion of the words "then, inasmuch as it has been made to appear to us, on the admission of the said William Menary, that the said William Menary has no goods or chattels whereon to levy the said several sums by distress" was proper: if they had no power to issue a distress warrant, these words were mere surplusage and did not vitiate the conviction.

If the justices had the power to require the costs and charges of conveying him to gaol to be paid by the defendant, then these words were properly inserted in the

Judgment. conviction. But if they had no such power, I am of
Armour, C.J. opinion that the conviction was amendable, as and when
it was amended, for they were not amending their adjudication of punishment, which was the imposition of the fine and, in default of payment, of the imprisonment, but merely the proceeding by which payment of the fine was, according to their view of the law, to be enforced. See *McLellan v. McKinnon*, 1 O. R. 219; *Reg. v. Bennett*, 3 O. R. 45; *Reg. v. Dunning*, 14 O. R. 52; *Reg. v. Lake*, 7 P. R. 215; *Reg. v. Sutton*, 42 U. C. R. 220; *Rex v. Elwell*, 2 Ld. Raym. 1514.

In this particular case there were no costs or charges of conveying the defendant to gaol, nor were there any such required to be paid by the commitment.

In the view that I am inclined to take of the provision of section 70, as above stated, the justices could not make the imprisonment dependent on the payment of the fine and costs, but this is an objection which has not been taken by the defendant, and, as making it so dependent is if erroneous, altogether in favour of the defendant, I do not think that I ought to give effect to it.

There is no doubt that the defendant was guilty of the offence of which he was convicted, and that he was properly convicted of it, and having regard to the provisions of sec. 105 of the Act R. S. O. ch. 194, we do not think that the conviction or warrant ought to be quashed.

The order *nisi* will, therefore, be discharged with costs.

[CHANCERY DIVISION.]

QUEEN V. BIRCHALL.

*Courts—Chancery Divisional Court—Jurisdiction—Criminal matters—
R. S. O. 1887, c. 44, s. 62—Consolidated Rule 218—Marginal Rule
480.*

On a motion to make absolute a rule *nisi* in a criminal matter before the Chancery Divisional Court:—

Held, per BOYD, C., that the Court had jurisdiction to entertain the matter, for the Divisional Sittings of the High Court of Justice are now the equivalent for the former sittings in full Court in term at common law, or for the purpose of rehearing in Chancery, and the criminal jurisdiction vested in the High Court not exerciseable by a single Judge is by the effect of legislation to be administered by Judges composing any of these Divisional Courts. Each Division is to follow the same practice, and therefore the Chancery Division is empowered to use the criminal practice and procedure which was formerly peculiar or limited to the Common Law Courts:—

Held, per FERGUSON, J., that the Court had not jurisdiction to entertain the matter, inasmuch as it was a Divisional Court sitting under the provisions of Cons. Rule 218; and had, therefore, only power to exercise the jurisdiction of the High Court for the purposes referred to in R. S. O., 1887, ch. 44, sec. 62, and not the power to exercise the full jurisdiction of the High Court, such as, *semble*, would be possessed by a division of the Court sittings under the provisions of old marginal Rule 480. There were no rules of Court whereby it had been ordered that any criminal business should be transacted and disposed of by this Divisional Court of the High Court, for the purpose of which it would be necessary to exercise any part of the criminal jurisdiction of the High Court.

THIS was a motion to make absolute rules *nisi*, calling Statement upon C. W. Bunting, managing director of the Mail Printing Company, and David Creighton, Manager of the Empire, to show cause why they should not be committed or otherwise punished for contempt of Court in publishing in the respective issues of their newspapers, a despatch from Lockport, N. Y., which counsel for Reginald Birchall, who was then in Woodstock gaol awaiting his trial for the murder of Benwell, alleged would have the effect of prejudicing his client upon his trial.

The despatch in question related to the finding of a large trunk, and alluded to an opinion of a chief of police that Birchall intended to enclose the body of his victim in it and send it over Niagara Falls.

Argument.

The motion was argued on June 24th, 1890, before the Chancery Divisional Court, composed of BOYD, C., and FERGUSON, J.

Hellmuth, for the motion.*

W. R. Meredith, Q. C., for the defendant, Bunting.

H. Cassels, for the defendant, Creighton. These are criminal proceedings: *O'Shea v. O'Shea*, 15 P. D. 59; but the Chancery Division has no criminal jurisdiction at all. The Judicature Act, R. S. O., 1887, ch. 44, sec. 35, gives to the High Court of Justice the jurisdiction of all the old Courts. But sec. 163, and Con. Rule 1, provide that nothing shall affect criminal procedure. R. S. C. ch. 174, secs. 259-264, gives power in Crown cases reserved, but there is no other authority or enactment which gives jurisdiction. *Regina v. Beemer*, 15 O. R. 266, shews that this Divisional Court has no power. The High Court of Justice Chancery Division is not the Chancery Divisional Court. The sittings of the High Court of Justice are the old term sittings, and the Chancery Divisional Court sittings do not follow the old terms: Con. Rule 216. This Divisional Court is a substitution for the old rehearing: Con. Rule 218. Con. Rule 219, shews what Divisional Courts can do.

Hellmuth, in reply. This Division has been in the habit of entertaining criminal matters: *Regina v. Logan*, 16 O. R. 335; *Regina v. Webster*, *ib.* 187; *Regina v. Fee*, 13 O. R. 590.

June 26th, 1890. BOYD, C.:—

The High Court of Justice for Ontario consists of three divisions: the Queen's Bench Division, the Common Pleas Division and the Chancery Division, and this mainly for convenience in the distribution of business, R. S. O. 1887, c. 44, secs. 3, 60.

*The judgments of the Court turning solely upon the question of jurisdiction, only that part of the argument is reported which relates to that question.—*REP.*

The High Court has all such powers as by the law of ^{Judgment.} England are incident to a Superior Court of civil and ^{Boyd, C.} criminal jurisdiction, and shall hold plea in all and all manner of actions and causes civil and criminal and may and shall proceed by such process and course as are provided by law, and as shall tend with justice and despatch to determine the same: *ib.* s. 20.

The High Court possesses all the jurisdiction formerly vested in or capable of being exercised by the Court of Queen's Bench and Common Pleas and is a combination of these and other Courts enumerated in sec. 35.

By sec. 57, subject to Rules of Court, the High Court and the Judges thereof shall have power to sit and act at any time and at any place for the transaction of any part of the business of the Court, or for the discharge of any duty which by statute or otherwise is required to be discharged: Subject to this provision the Divisional Sitzings of the High Court are to be at Toronto. All causes and matters may be distributed among the several divisions: Sec. 60.

Business is to be disposed of by one Judge as far as practicable, but other business as ordered by Rules of Court shall be transacted by the Divisional Courts of the High Court.

Divisional Courts is synonymous with "divisional sittings of the High Court," when two or three Judges sit for the disposal of business, that not being of the competence of a single Judge of the Court comes properly before a full Court or a Court *in banc*.

Divisional Courts are constituted for the transaction of the business of any of the divisions of the High Court, and all arrangements required for holding any Divisional Courts of the High Court for any purpose authorized by the Act, shall be made under the direction and superintendence of the Judges of the High Court: R. S. O., 1887, ch. 44, sec. 64.

The Divisional sittings of the Court are now the equivalent for the former sittings in full Court in term at Common Law, or for the purpose of re-hearing in Chancery: and

Judgment.

Boyd, C.

the criminal jurisdiction vested in the High Court, not exercisable by a single Judge, is by the effect of legislation to be administered by Judges composing these Divisional Courts: *Dixon v. Farrer*, 18 Q. B. D. at pp. 49, 51, indicates this, though the Act is different in England. I cannot trace in the constitution of the Court a further separation of powers as suggested in *Regina v. Beemer*, 15 O. R. 266, by which the sittings of the Judges of any division in Court is to be distinguished from the sittings of the Divisional Court. By sec. 63, Divisional Courts are if practicable to include one Judge, at least, attached to the particular division of the Court to which the cause, out of which the business in hand arises, has been assigned, but this is not essential. Apart from the sittings for the trials of causes under sec. 89, the only rules made under sec. 57, are for the sittings of Divisional Courts: Rule 216, 217, 218, 219.

The discharge of particular lines of civil business, is regulated by these rules, but this does not affect the criminal jurisdiction and procedure of the High Court, the latter of which is not subject to Provincial control: B. N. A. Act, sec. 9, sub-sec. 27.

If criminal jurisdiction is not vested in and exerciseable by the Judges holding the Divisional Sittings of the High Court of Justice, I see no other tribunal that can exercise such jurisdiction according to the present constitution and organization of the Provincial Courts.

General criminal jurisdiction is possessed by the High Court of Justice for Ontario by virtue of concurrent enactments of the Legislature of Ontario and the Parliament of the Dominion, the one establishing the Courts as of criminal jurisdiction, and the other recognizing it in that character: R. S. C. ch. 174, sec. 270. By this section the criminal practice and procedure is to be the same as before the constitution of the High Court, but as I understand each division is to follow the same practice: this would empower the Chancery Division to use the criminal practice and procedure which was formerly peculiar or limited to the common law Courts.

FERGUSON, J. :—

Judgment.

Ferguson, J.

This Court is, as I understand the matter, a Divisional Court of the Chancery Division, sitting under the provisions of Con. Rule 218.

The original Marginal Rule 480, provided for the sittings of the High Court of Justice, saying that there should be three in every year, Michaelmas, Hilary, and Easter Sittings, the terms of such sittings corresponding with the periods at which the Courts of common law had theretofore sat in Term ; but these provisions of the Rule were not to apply to the Chancery Division, (by sub-sec. c. of the Rule) except when the Judges thereof should be of opinion that the business of the division was such as to render such provisions necessary or convenient for the due despatch of business, and should give notice to that effect.

Section 9 of the original Act was substantially the same as section 35 of R. S. O., 1887, ch. 44, and the provision is that the High Court shall have generally all the jurisdiction which, prior to the 22nd day of August, 1881, was vested in or capable of being exercised by the Court of Queen's Bench, Court of Chancery, Court of Common Pleas, and Court of Assize, Oyer and Terminer, and Goal delivery, (whether created by commission or otherwise) and the High Court shall be deemed to be, and shall be a continuation of the said Courts respectively, (subject to the provisions of the Act) under the said name of "The High Court of Justice for Ontario." The original Marginal Rule 480, manifestly I think, contemplated that the sittings of the High Court should be by Divisions. The special provision respecting the Chancery Division, shows this, I think, and it would follow that each Division of the Court sitting at the times mentioned in the Rule, would have and be capable of exercising the jurisdiction of the High Court, but the Chancery Division would not sit at these times unless by a compliance with the provisions of sub-sec. c. of the Rule (before referred to). Sub-sec. d. of the same Rule, provided that Divisional Courts of the

Judgment. High Court were to sit at such further and other times as might be directed by the High Court, or as might seem necessary for the due despatch of business.

Ferguson, J. The original Act, after providing for the distribution of the business, provided by section 29, that all business that might, from time to time, be so ordered by rules of Court, should be transacted and disposed of by Divisional Courts of the High Court, which should for that purpose, exercise all or any part of the jurisdiction of the High Court. This section 29, together with sections 30 and 31, provided for the constitution of the Divisional Courts, and that any number of them might sit at the same time. These sections were substantially the same as sections 62, 63, and 64 of R. S. O. 1887, ch. 44 ; and I think it plainly appears that under these provisions the Divisional Courts could only exercise the jurisdiction of the High Court so far as it should be necessary so to do in transacting and disposing of the business ordered to be done by or assigned to them respectively. The jurisdiction to be exercised by them, being thus limited and differing in extent from that jurisdiction exercisable by each Division of the Court sitting under the provisions of the original Marginal Rule 480, sub-secs. *a.* and *b.*, which would, as I have said, be in my opinion, the full jurisdiction of the High Court.

By the Con. Rule 216, the language of the original Marginal Rule 480, has been changed, and the provision now is for the sittings of the Divisional Courts at the times mentioned, which are the same times as in the original Rule, and the exception as to the Chancery Division is the same as before. Con. Rule 217, provides for sittings of the Divisional Courts of the Chancery Division at three periods in each year, which are different from the times mentioned in Rule 216, and Con. Rule 218 provides that the Divisional Courts of the High Court are to sit at such further or other times as may be directed by the High Court, or as in the opinion of the Judges of the Division may be necessary for the due despatch of business ; and as I have said, it is under this provision that the present

sittings of the Divisional Court of the Chancery Division ^{Judgment.} takes place, and the sitting is a sittings of a Divisional ^{Ferguson, J.} Court having only power to exercise the jurisdiction of the High Court for the purposes referred to in the 29th section of the original Act, and in section 62 of R. S. O. 1887, ch. 44, and not the power to exercise the full jurisdiction of the High Court, such as I think would be possessed by a Division of the Court sitting under the provisions of the original Marginal Rule 480, sub-secs. *a.* and *b.* I am not aware of any Rules of Court whereby it has been ordered that any criminal business shall be transacted and disposed of by this Divisional Court of the High Court, for the purposes of which it would be necessary to exercise any part of the criminal jurisdiction of the High Court, even if it be assumed that power exists to make any such Rules, and I do not perceive any way in which this Divisional Court can have or possess a criminal jurisdiction unless it is derived through the High Court. The Chancery Division might, I think, if circumstances arose rendering it necessary so to do, have exercised the powers given by sub-sec. *c.* of the original Rule 480, and held sittings at the times mentioned in the earlier part of the Rule, in which case the Division so sitting could, I think, have exercised any part of the jurisdiction of the High Court. Any difference in this respect that may have arisen by the passing of Con. Rules 216 and 217, it does not seem necessary now further to discuss.

The other Divisions of the High Court are not in the same position with regard to criminal jurisdiction, because for one reason at least, the former Courts of Queen's Bench and Common Pleas had criminal jurisdiction, but the former Court of Chancery had not.

The matter now before us, is shewn by the authorities to be in its nature a criminal matter, and for reasons that I have endeavoured to give, I am of the opinion, (although, owing to the complicated character of the various provisions of the laws on the subject, not without some doubt) that this Court has not a criminal jurisdiction, and there-

Judgment. fore not the jurisdiction necessary to deal with and dispose
Ferguson, J. of these matters. As a consequence, the matters should, I
think, drop.

It appears that some matters in their nature of a criminal character, have heretofore been dealt with in this Court ; but in those instances no question as to jurisdiction was raised. Some of them too were offences against provisions of Acts of the Provincial Parliament, if my recollection is correct.

A. H. F. L.

[CHANCERY DIVISION.]

MARTIN V. MAGEE ET AL.

Vendor and Purchaser—Title—"Devolution of Estates Act"—Outstanding mortgage—Matters of conveyancing and matters of title—R. S. O. 1887, c. 108.

On a sale of lands the purchaser objected to the title on the grounds (1) that there was no evidence that a certain mortgage had been discharged and (2) that title being deduced through the devisee of a person who had died since the coming into force of the "Devolution of Estates Act," R. S. O., 1887, c. 108, the legal estate was outstanding in the executor of such person. It appeared that all debts of the testator had been paid :—

Held, that both matters were matters of conveyancing, and not of title. Under the "Devolution of Estates Act," where debts have been paid, or where there are no debts, executors will hold the bare legal estate for the devisee of the land of the deceased.

THIS was an action brought by John M. Martin against Statement. the executors of the will of Catharine Sheppard, claiming to recover back a deposit of \$225, paid by him on account of a contract of purchase at auction of certain lands, entered into by him on April 20th, 1889, upon the ground of certain alleged misrepresentations as to the property made by the auctioneer at the time of sale, and also upon the ground that the defendants did not exhibit a good and sufficient title in them to the said lands, and were unable or unwilling to do so. He also set up that he had demanded from the defendants repayment of the deposit or a reduction of the purchase money; but that the defendants had refused to repay the same or reduce the purchase money, and had declared the same forfeited.

The defendants pleaded that the plaintiff should have accepted their title to the lands, the same being a marketable one, and denied that there were any misrepresentations as alleged, and claimed that they were entitled to retain the deposit as forfeited.

The action came on for trial before FERGUSON, J., at Toronto, on November 26th, 1889.

It appeared that the plaintiff had delivered requisitions on the title, one of which called for evidence that a certain

Statement. mortgage dated April 27th, 1859, had been discharged, and another was as follows :

8. The lands of H. C. Sheppard vested in his executor : required a conveyance from his executor.

It also appeared that the conditions of sale called for payment at the time of sale of a deposit of 10 per cent., and of the balance of the purchase money within two weeks after the sale ; and that two of the conditions of sale were as follows :

4. The vendors shall furnish a Registrar's abstract of title, and such title deeds as may be in their possession only, together with a deed of the property ; the purchaser is to verify the title at his own expense, and to be at all further expense arising out of the purchase.

6. If the purchaser fails to comply with the conditions aforesaid or any of them, the deposit and all other payments made thereon, shall be forfeited and the premises may be re-sold, &c.

It also appeared that on or about June 21st, 1889, the vendors served the plaintiff with a written notice forfeiting the deposit for non-compliance by the plaintiff, with the conditions of sale, and of intention to re-sell, and look to the plaintiff for any loss on such re-sale.

The other material facts are sufficiently referred to in the judgments.

At the conclusion of the evidence, the learned Judge gave judgment against the plaintiff, so far as the alleged misrepresentations at the time of sale were concerned, finding that no such misrepresentations had been proved ; but reserved his judgment as to the remaining questions arising in the case. Afterwards he gave judgment upon them as follows :

FERGUSON, J.—In considering the remaining questions it is proper to bear in mind that the plaintiff brings the action claiming repayment of the deposit made by him at

the time of his purchase, and it rests upon him to shew Judgment.
all those things that are necessary to entitle him to such Ferguson, J.
repayment.

The contract provides for the payment by the purchaser of the deposit of 10 per cent. of the purchase money, and for payment of the remainder by him within the time stated, and that after such payment he should be entitled to a conveyance, and to be let into possession. The vendors were to furnish a Registrar's abstract and such title deeds as might be in their possession only, together with a deed of the property, and the purchaser was to verify the title at his own expense, and be at all further expense arising out of the purchase; and should the purchaser fail to comply with the conditions or any part of them, the deposit and all other payments made were to be forfeited, and the lands might be resold.

In Fry on Specific Performance, 2nd ed., secs. 1366 and 1367, *et seq.*, the duties of the vendor and purchaser towards one another are stated generally. It is there, amongst other things, said that the vendor is bound to show a good title to the property sold, and upon being paid the purchase money and any interest upon it that may have become payable, to execute and procure the execution by all other necessary parties (if any) of a proper deed of conveyance, vesting the legal estate in the purchaser, and to put him in possession of the property; and that on the other hand the purchaser is bound, as soon as either the vendor has shown a good title or he (the purchaser) has accepted such title as the vendor shows or has, to pay the purchase money and any interest upon it that may have become payable.

The plaintiff, the purchaser, having failed in his contention in respect to the alleged misrepresentations at the time of the sale, seeks to make out that a good title was not shown, and he relies on two matters only, namely that the evidence to show that the \$200 mortgage dated in 1859, and payable six months after date, is not a charge was insufficient; and that the estate devolved upon

Judgment. Blackburn, the executor of the last will of Herbert C. Ferguson, J. Sheppard, a former owner of the property, and was therefore outstanding.

As to the mortgage; in Dart on Vendors and Purchasers, at pp. 323 and 324, it is said: "But in a modern case, where the vendor, who was not bound to convey the estate by any particular day, deduced a good title to the equity of redemption, the existence of mortgages affecting the property, was held not to be a defect of title, although they were not mentioned in the contract, and no notice had been given of the intention to pay them off. In equity, as a general rule, mortgages and other incumbrances, are considered merely matters of conveyance."

It was said that there was evidence which the plaintiff might have seen going to show that this small mortgage had been satisfied; but even supposing that such is not the fact, and that it is an actual encumbrance on the property or part of it, it would not, according to the authorities, I think, be a defect of title. As to the other objection, it is said by the same author, (Dart) at pp. 322 and 323: "So, if the legal estate be outstanding, the abstract must show in whom it is vested; or that the vendor can get it in; but when it is shown that the legal estate can be got in, the abstract is perfect;" and at p. 324: "At any rate it may be considered that the title is perfect, whenever it appears that under the contract the purchaser either already has, or will necessarily before the time fixed for completion, be able to acquire an immediate and indisputable right to the legal and equitable estates; even although the absence of parties, or other circumstances, may considerably delay the conveyance." It is said this executor is quite willing to make the conveyance of the estate that devolved upon him; and if he were not, surely there exists the right to compel him to do so.

In the present case, the vendor was not bound to furnish any abstract of title but what is called a registrar's abstract, and this he did. The purchaser, as if he had the right so to do, furnished requisitions and objections as to

the title, all of which are satisfied or dissipated, but the ^{Judgment.} two in question, and both parties understood perfectly ^{Ferguson, J.} what were the differences, and the only differences between them.

I am of the opinion that, notwithstanding these two objections, and all that was urged in regard to them, a good title appeared, and that these objections rest upon matters of conveyancing and not matters of title.

The plaintiff states his case basing his right to relief upon the alleged misrepresentations, saying that by them he was induced to bid for the property as he did, and that otherwise he would not have done so; that he demanded repayment of the deposit or a reduction of the purchase money, which the defendants refused; and then in the 8th paragraph, he "further says," that the defendants did not exhibit a good and sufficient title to the lands; and that they were unable and unwilling to do so, and that he was not bound to carry out his purchase unless the defendants shewed a good title.

I have before referred to the terms of the contract as it relates to the making or furnishing title.

At the close of the trial I disposed of the matter of the alleged misrepresentations, and I have now to say whether or not this 8th paragraph of the statement of claim is true; and I am of the opinion, for the reasons I have stated, that this paragraph has not been shewn to be true, but the contrary thereof, it appears that it is untrue. When the plaintiff made the demand which he alleges, and upon which he relies, he avowedly disaffirmed the contract, and being wrong in his reasons for doing this which were, as I understand his pleading, confined to the alleged misrepresentations inducing the contract—he cannot complain that this was treated as a breach by him. Nor can he rely upon any issue foreign to his pleading, such as the one as to whether the conveyance offered him was sufficient or not. Under the circumstances the defendants were not, I think, bound to tender him any conveyance at all. Surely when a man has demanded back the

Judgment.
Ferguson, J.

deposit and declared that he will not perform the contract unless it is changed, and this on the alleged but false ground that he was defrauded in the making of the contract, he cannot say that there was not a failure on his part to comply with the conditions of the contract.

Then upon failure by the plaintiff to comply with the conditions of the contract, or any of them, the right to forfeit the deposit and re-sell the property, arose according to the terms of the contract itself.

No question arises as to the manner in which the forfeiture was declared. The plaintiff says it was declared, and the defendants say the same thing.

I am of the opinion that the plaintiff has failed to make out the case on which he has relied, and that the action should be dismissed with costs, and the registration of the *lis pendens* vacated; if any order as to this is necessary, any additional costs occasioned in doing this will also be paid by the plaintiff.

Judgment accordingly.

The plaintiff now moved before the Divisional Court by way of appeal from the above judgment.

The motion came on for argument on June 16th, 1890, before BOYD, C., and ROBERTSON, J.

E. D. Armour, Q.C., and *D. Macdonald*, for the plaintiff. The point we take is that no title was made out. First, there is an outstanding mortgage, and no discharge; and secondly these defendants could not make title, because the title was devised originally by H.C. Sheppard to his mother, and by her to these defendants her executors. The executors of H. C. Sheppard took the legal estate, and there is nothing to shew that these defendants ever had a title. The defendants sold as executors. It was devised to them in trust for sale. Besides the vendors were to give a deed by the fourth condition, and before they can forfeit for our not accepting their deed they must shew that they tendered a proper deed. *Re Reddan*, 12 O. R. 781, shews that under the

“Devolution of Estates Act” R.S.O. (1887), ch. 108, real estate Argument. becomes of the same nature as personalty, and we contend assent of the executor is required before it vests in a devisee. There was here no evidence of the consent of the executors of H. C. Sheppard to the devise to his mother. It is moreover necessary for a devisee before he can make a sale of property devised to shew that it was not wanted for the purpose of paying debts. The devisee has not full title till he or she has the assent of the executor, and in addition evidence that the executor won’t want the property for payment of debts. It can be followed into the hands of a purchaser: *Chamberlen v. Clark*, 1 O. R. 135. The executor of H. C. Sheppard had a perfectly good right to sell this to somebody else. If we were paying it into his hands it would be all right, but we are not. There may be such a thing as a question of conveyance, which is a question of evidence also; for example, proof of a fact essential to title may be required, which then becomes a question of title: Fry on Specific Performance, 2nd ed. secs. 1357, 1363. On the question of the position of a legatee (that of devisee being now the same, as we contend): see Wentworth on Office of Executors, pp. 67, 69; Bac. Abr. Tit. Executors and Administrators, L. 3; *Doe v. Guy*, 3 East. 120, and cases therein cited; *Deeks v. Strutt*, 5 T. R. 690; Lewin on Trusts, 8th ed., p. 477; *Dix v. Burford*, 19 Beav. 409; *Chamberlain v. Chamberlain*, 1 Ch. Cas. 256; *Traill v. Bull*, 22 L. J. Ch. 1082; *Young v. Holmes*, 1 Str. 70; *Doe v. Sturges*, 7 Taunt. 217. Above all they did not offer us a proper conveyance, and they had no right to forfeit the deposit.

Hoyles, Q. C., and *Chisholm*, for the defendants. The real point at the trial was misrepresentation and fraud, which the plaintiff charged; but Ferguson, J., found in effect that the plaintiff put an end to the contract on baseless grounds, and had not made out his case of fraud. If they had asked in their requisitions for evidence as to debts of H. C. Sheppard, they would have got it. [BOYD, C.—Had you the right to cancel because the plaintiff wanted

Argument.

the executor to join ?] That was not the case. It was the misrepresentations, and a repudiation by the plaintiff himself on that ground: *Re Reddan*, is qualified by *Re Nixon*, 13 P. R. 314. We submit that the fair construction of the "Devolution of Estates Act" is, that lands are not made personalty for all purposes. [Per Curiam. *Reid v. Miller*, 24 U. C. R. 610.] The will operated and the title passed to the devisee, and we have both the legal and equitable estate. That is the reasonable way to construe the statute. The law does not allow following of chattels: Williams on Executors, 7th ed., p. 1379, though it may compel a legatee to refund. The same reference shews that an executor cannot retract his assent in all cases. At p. 1377, assent may be presumed. Williams on Executors, at p. 1374, shews that the executor could be compelled to give his assent by a Court of Equity, and such assent would have relation back to the death of the testator; *ib.*, pp. 1379-80. Assent creates no new title, but perfects that under the will: Roper on Legacies, 4th ed., p. 844. The matters raised are mere matters of conveyance: *Rae v. Geddes*, 18 Gr. 217; *Camberwell and South London Building Society v. Holloway*, 13 Ch. D. 763. We also cite *Avarne v. Brown*, 14 Sim. 303; *Kitchen v. Palmer*, 46 L. J. Ch. 611.

Armour, in reply. We are not bound to take the title if we shew the vendors had no title. The issue of title was just as important in this case as the issue of fraud. It is said that there was no requisition made for proof of payment of debts; but the defendants were bound to satisfy themselves as to that and get us a conveyance.

The vendors have only a qualified title and cannot force it on us. As to the construction of the "Devolution of Estates Act," I never argued that it turned everything into personalty. It puts the title in the same person and makes it subject to the same powers of disposal, *i. e.*, in executors. *In Re Pilling's Trusts*, 26 Ch. D. 432.

June 30th, 1890. BOYD, C. :—

The only point that seemed of importance at the close of the argument was whether or not the plaintiff was justified

in refusing to complete because of want of title in the vendors. The title offered was that of the devisee of the owner, and apart from the effect of the "Devolution of Estates Act" that title was unquestionably good. The owner Sheppard died February 10th, devising the land to his mother. She died ten days afterwards and her representatives exposed for sale the property by auction on April 20th of the same year. The land by section 4 devolved upon and became vested in the executors of Sheppard as assets for the payment of his debts. These being paid, or there being no debts, the executors would hold the bare legal estate for the devisee of the land. In other words, subject to the payment of debts, the beneficial interest in the land passes to the devisee, and she can make title as the real owner. Of course if the payment of the debts will exhaust the land and other assets there is no beneficial interest; but if the debts fall short of this in amount the matter is in practically the same condition as with regard to any other incumbrance, *i.e.*, upon the charge or incumbrance being satisfied (which can be done out of the purchase money) the clear title can be conveyed. In this latter case the question is considered one of conveyance and not of title. As a fact in the present case the debts had been satisfied and the executor was a bare trustee for the vendor. This fact was not communicated to the purchaser, and in ordinary circumstances the duty of communication would rest on the seller, but here the conditions of sale provide against this by the fourth condition which reads: [The Chancellor set out the condition as above.]

If enquiry had been made by the purchaser he would have learned of this state of facts which shews title in the defendant.

This line of attack was apparently a subsidiary one, and there appears to be no reason for disturbing the present judgment, which should therefore be affirmed with costs.

ROBERTSON, J., concurred.

A. H. F. L.

Judgment.

Boyd, C.

[COMMON PLEAS DIVISION.]

REGINA V. SMITH.

Criminal law—Separate indictments for taking unmarried girl out of control of father, and seduction—Separate offences.

The prisoner was convicted under R. S. C. ch. 162, sec. 44, the Act relating to "offences against the person," for unlawfully taking an unmarried girl under the age of sixteen years out of the possession and against the will of her father. On the same day the prisoner was again tried and convicted, under R. S. C. ch. 157, sec. 3, the Act relating to "offences against public morals," for the seduction of the said girl being previously of chaste character and between the ages of twelve and sixteen years of age:—

Held, that the offences were several and distinct, and that a conviction on the first indictment did not preclude a conviction on the second one.

Statement. At the Spring Assizes 1890 for the county of Grey, the prisoner was convicted before ROBERTSON, J., on two separate indictments: the first indictment was for unlawfully taking one Ellen Jane Darby, an unmarried girl under the age of sixteen years, out of the possession and against the will of David Darby her father.

On the same day the prisoner was afterwards tried and convicted for having unlawfully seduced and of having illicit carnal knowledge of and connection with the said Ellen Jane Darby, she, the said Ellen Jane Darby, then being a girl of previously chaste character above the age of twelve years, and under the age of sixteen years.

The learned Judge at the conclusion of the first trial sentenced the prisoner to imprisonment in the Central Prison for the period of twenty-three months.

At the conclusion of the second trial when motion for judgment was made by counsel for the Crown, it was objected on behalf of the prisoner as a reason why judgment should not be pronounced, that the defendant had already been convicted and sentenced on the conviction under the first mentioned charge, which conviction had been found on evidence which established the same facts and circumstances on which he had been convicted on the last

mentioned charge, and that therefore the latter conviction ^{Statement.} should be quashed and the prisoner discharged.

The learned Judge stated: "After argument I determined to reserve the question raised for the consideration of the Justices of the Common Pleas Division, and therefore postponed the judgment until such question has been considered and decided."

In Easter Sittings, June 6th, 1890, the case was argued before GALT, C. J., and MACMAHON, J.

A. H. Dymond, for the Crown.

No one appeared for the prisoner.

June 27, 1890. GALT, C. J. :—

The same question arose in the case of *Rex v. Handley*, reported in 5 C. & P. 565. The prisoners were indicted on two charges, the first for shooting at B. an inn keeper, and the second indictment for night poaching. The counsel for the prisoners submitted that "as the two indictments were in reality founded on the same identical transaction, the prosecutor ought to be put to elect which he would proceed upon, and abandon the other."

Mr. Justice Parke: "These are quite distinct offences, and the one cannot by possibility merge in the other. I think therefore the prosecutor is not bound to abandon either."

The present is a much stronger case. The first indictment is under R. S. C. ch. 162, sec. 44. "Offences against the person." The second is under R. S. C. ch. 157, sec. 3. "Offences against public morals." They are several and distinct offences.

MACMAHON, J. :—

I fully agree with his Lordship the Chief Justice.

A previous conviction can only be pleaded in bar to a subsequent indictment for the same offence of which the defendant has previously been convicted: 2 Hale 251.

Judgment.
MacMahon,
J.

Upon the trial of the prisoner under the second charge, in addition to the evidence given on his trial under the first indictment, evidence was required to be given of the seduction and the illicit carnal knowledge and connection before a conviction could be had on the second indictment.

Regina v. Prince, L. R. 2 C. C. R. 154, was a prosecution for unlawfully taking an unmarried girl under the age of sixteen years out of the possession and against the will of her father; and in Shirley's Criminal Law, 19, the author referring to that case draws attention to the fact "that it is not merely the seducer who is punished for this offence, but any person who takes the girl from her house for purposes inconsistent with the exercise of the control of her proper guardian."

As precluding any question that the offences charged in the two indictments are two distinct offences, it is only necessary to point out that the abduction may have been designed and carried out from motives which appeared to the abductor highly meritorious.

In *Regina v. Booth*, 12 Cox C. C. 231, tried in 1872, the defendant persuaded a girl of fifteen to leave her father for a comfortable home.

Mr. Justice Quain in summing up said, at p. 232:

* * "His motives, his philanthropy, and the fact that she" the girl "was willing to go, have nothing to do with the question before you. * * That a man should interfere in another's household, invade the sanctity of his home and deprive parents of their child from motives of philanthropy, would be a most dangerous doctrine. * * The real issue for you to try is simply this: Was the girl induced to leave her father's house by Booth?"

See also as to questions arising out of a plea of *auterfois acquit*: *Regina v. Magrath*, 26 U. C. R. 385, where a number of authorities on the point are reviewed by Draper, C. J.

The same rules apply generally to the plea of *auterfois convict* as apply to a plea of *auterfois acquit*. And where the latter plea is pleaded the test is: Was the prisoner

placed in jeopardy a second time for the same offence, and would such plea to the second indictment avail as a defence thereto ?

Judgment.
MacMahon,
J.

The clearest and most instructive decision arising out of a plea of *autrefois acquit* is that contained in the judgment of Mr. Justice Buller in *Rex v. Vandercombe, and Abbott*, 2 Leach C. C., (4 ed.), 708, at p. 717. The judgment was given on a demurrer to a special plea of *autrefois acquit* in bar to an indictment for burglary with intent to commit a felony, and was argued before all the judges of England.

The prisoners had been indicted for a burglary in which the felony was laid as having been actually committed and on their trial on that indictment were acquitted. They were afterwards indicted for the same burglary laid *with intent to commit* the felony ; and it was held that a plea of *autrefois acquit* could not be pleaded to the second indictment, for they were two distinct and different offences.

Buller, J., said : "It is quite clear, that at the time the felony was committed, there was only one act done—namely, the breaking into the dwelling-house. But this fact alone will not decide this case ; for burglary is of two sorts : First, breaking and entering a dwelling-house in the night time, and *stealing goods therein* ; Secondly, breaking and entering a dwelling-house in the night time *with intent to commit* a felony, although the meditated felony, be not, in fact, committed. The circumstance of breaking and entering the house is common and essential to both the species of this offence ; but it does not of itself constitute the crime in either of them ; for it is necessary to the completion of burglary, that there should not only be a breaking and entering, but the breaking and entering must be accompanied with a felony actually committed or intended to be committed. (See *Dobb's Case*, 2 East C. L. 513) ; and these two offences are so distinct in their nature, that evidence of one of them will not support an indictment for the other. In the present case, therefore, evidence of the breaking and enter-

Judgment. ing with intent to steal, was rightly held not to be sufficient to support the indictment charging the prisoner with having broke and entered the house, and stolen the goods stated in the first indictment; and if crimes are so distinct that evidence of the one will not support the other, it is as inconsistent with reason, as it is repugnant to the rules of law, to say that they are so far the same that an acquittal of the one shall be a bar to the prosecution for the other.”

MacMahon.
J.

There must be judgment for the Crown affirming the conviction.

[COMMON PLEAS DIVISION.]

HOWARD V. THE CORPORATION OF THE CITY OF ST.
THOMAS ET AL.

Municipal corporations—House being moved coming in contact with telephone wire across street, loosening bricks and injuring passer by—Liability.

O. was moving a house twenty-five feet high along one of the streets in a city, having obtained the authority of the city engineer to do so, when by reason of its coming in contact with a wire, of the existence of which O. was fully aware, stretched by a telephone company, without any authority from the city, across the street, the wire being nineteen and a half feet from the ground, though the company's Act of incorporation required it to be at least twenty-two feet, the wire was torn from its fastenings, loosening some bricks, which fell on the plaintiff severely injuring him :—

held, that no liability attached either to the city or the telephone company, and that O. was alone liable for the damage sustained by the plaintiff.

Decision of STREET, J., at the trial, varied.

THIS was an action tried at St. Thomas, at the Spring Assizes for 1889, before STREET, J., who delivered the following judgment in which all the facts are stated.

May 4, 1889. STREET, J. :—

The defendant, Oliver, was moving a house along William street, in the city of St. Thomas—he had obtained authority to do so from the city engineer. The house was being drawn along the street by several pairs of horses. The defendants, the Bell Telephone Company, without any authority from the city, had stretched a wire from a roof of a stable to a house on the opposite side of the street, and this wire was only 19½ feet from the ground. The defendant, Oliver, had notified the Telephone Company of his intention to remove the building, and their employees were present intending to lift their wires, but left just before the accident without doing so. The house was drawn by the horses against the wire. The wire was torn from its fastenings, and brought down a quantity of bricks from the roof of the stable upon the

Judgment. head of the plaintiff who was lawfully standing upon the
Street, J. street, and severely injured him.

The action was brought originally against the city corporation alone. They applied to have the other defendants added as defendants under sec. 531, of the Municipal Act and the plaintiff included them all in his statement of claim as being guilty of negligence and liable directly to him. The wire in question had been in the same position for upwards of a year before the accident happened; and the jury found that the defendants, the city, should have known of its position.

They also found that the defendant, Oliver, was making a reasonable use of the highway in drawing the house in question along it: that the telephone wire was not a sufficient distance above the level of the street to allow the street to be used safely for all reasonable purposes: that the Telephone Company were guilty of negligence in not having the wire properly fastened to poles: (8) that the city engineer had authority to give the permission to move the building: that the city ought to have required the Telephone Company to stretch their wire higher above the street than it was in fact stretched: that the Telephone Company had no authority from the city to stretch their wire across the street in question: that the city had notice of the fact that the building was being removed along William street a sufficient time before the accident to have enabled them to have the wires raised or removed, and that they were guilty of negligence in not seeing that the obstructions were removed before granting the permit to move the building; and that the defendant Oliver was guilty of negligence in not seeing that the Telephone Company removed the obstructions.

Upon these facts and findings I think it is to be taken that the damage was caused jointly by the three defendants. The defendants the corporation of the city of St. Thomas are liable because they allowed William street to be obstructed for upwards of a year, and at the time of the accident, by the wire which caused the damage: that

the defendants the Bell Telephone Company are liable because they unlawfully created the obstruction which caused the damage; and that the defendant Oliver is liable for drawing his building against the wire without taking proper care to have it removed: *Lynch v. Nurdin*, 1 Q. B. 29.

Judgment.
Street, J.

The defendants the corporation of St. Thomas ask that they may have their remedy over against the other defendants under sec. 531 of the Municipal Act.

I think this is a case in which that relief should not be given to them. They had evidently assumed to control the moving of the house in question by giving permission to Oliver to move it, and the jury have found them guilty of negligence in not seeing that the obstructions were removed before granting the permit. Under these circumstances it cannot, in my opinion, be said that it has been established in this action that the damages were sustained by reason of the obstruction placed by the defendants the Telephone Company: the damages here were caused by the combined effect of the obstruction, the negligent acts of the city corporation and the negligent acts of the defendant Oliver. The negligence found against the city deprives them of the right to say that the damage was caused by the act of the Telephone Company. So far as the defendant Oliver is concerned it does not appear possible that such relief could in any case be given against him, because he did not create any obstruction upon the street: on the contrary, the jury have found that he was making a reasonable use of the highway in drawing the house along it; but the effect of their finding against him is that in driving his horse along the highway he did not take proper care to avoid an obstacle which he should have seen if he did not.

I have not overlooked the fact that the jury have found in answer to the question "at what sum do you estimate the damage?" that they estimate the damage at "\$125 to the father and \$375 to the son" who was injured, \$500 in all, adding the words "to be paid equally by the city and

Judgment. the Bell Telephone Company" thus declaring in their
Street, J. opinion that the defendant Oliver should pay no damages.
I think, however, that I must reject this part of their
answer as surplusage and treat the damages as assessed
against the persons liable to pay under the facts as found.

I direct judgment to be entered for the plaintiff George
F. Howard for \$125 and for the plaintiff John Howard
for \$375, against all the defendants with full costs of the
action. Judgment to be stayed until the fifth day of the
next Sittings of the Divisional Court.

The defendants the corporation of the city of St. Thomas
moved on notice to set aside the judgment entered for the
plaintiff and to enter the judgment in their favour, or to
have the judgment varied so as to recover from their
co-defendants, the Bell Telephone Company, the amount
of the damages and costs recovered against them, together
with their own costs of defence.

The defendants, the Bell Telephone Company, also moved
on notice to set aside the judgment entered against them
and for a new trial, or to vary the judgment by giving
them similar relief against their co-defendants.

In the Michaelmas Sittings of the Divisional Court,
(GALT, C. J., ROSE, and MACMAHON, JJ.), November 25,
1890, the motions were argued.

Ermatinger, Q.C., for the defendants the corporation of
St. Thomas.

Colin Macdougall, Q.C., and *S. G. Wood*, for the defen-
dants the Bell Telephone Company.

Doherty, for the defendant Oliver.

G. T. Blackstock, Q.C., and *Crothers*, for the plaintiff.

June 27, 1890. MACMAHON, J.:—

The jury having assessed the damages in favour of
George F. Howard (the father) at \$125, and in favour of
John Howard (the infant) at \$375, adding to their finding

that it was to be paid equally by the city and the Telephone Company, the learned trial Judge ignored the latter part of the finding, treating it as surplusage, and directed that judgment be entered against all the defendants for the damages found by the jury, with full costs.

Judgment.
MacMahon,
J.

There are two motions before us. The first on behalf of the defendants the city of St. Thomas, to have the action dismissed as against them, because they were not the proximate cause of the accident; that there was no evidence that William street was out of repair at the time of the accident, within the meaning of section 531 of the Municipal Act; that there was no evidence of authority to the city engineer on which to found question No. 8 and that such question involved a question of law which should not have been submitted to the jury; or to have the said judgment varied so as to recover from their co-defendants the amount of damages and costs which the plaintiff may recover against them, together with their own costs of defence.

Second. A motion by the defendants "The Bell Telephone Company," for a new trial, or to have the judgment of Mr. Justice Street varied by providing for the recovery against their co-defendants any damages and costs which the plaintiffs may recover, on the ground that the company was not guilty of any negligence rendering it responsible for the result of the accident.

As the questions to be considered are purely legal, the evidence taken at the trial was dispensed with on the motion, the Court being furnished with the questions submitted to the jury and their answers, together with the judgment of the learned trial Judge.

By R. S. O. ch. 184, sec. 531, sub-sec. 1 "Every public road, street, bridge and highway shall be kept in repair by the corporation, and on default * * the corporation * * shall be civilly responsible for all damages sustained by any person by reason of such default," &c.

Then under the 4th sub-sec. "In case an action is brought against any municipal corporation to recover

Judgment. damages sustained by reason of any obstruction * *
MacMahon, in a public highway, street," &c., "left or maintained by
J. another corporation or by any person other than a servant
or agent of the municipal corporation, the last mentioned
corporation shall have a remedy over against the other corporation or person for, and may enforce payment accordingly of the damages and costs, if any, which the plaintiff in the action may recover against the municipal corporation," under the circumstances provided for in that section.

Under the Act incorporating the defendants, "The Bell Telephone Company of Canada," 43 Vic. ch. 67, sec. 3 (D.) the company is authorized to construct its lines of telephone across any public highways, provided the company "shall not interfere with the public right of travelling on or using such highways, streets," &c.; and that in cities and towns the company "shall not erect any pole higher than forty feet above the street, nor affix any wire less than twenty-two feet above the surface of the street * * without the consent of the municipal council having jurisdiction over the streets of the said city," &c.

By 45 Vic. ch. 71 (O.) conferring certain powers on the said Telephone Company a like provision is made as to the height of the poles and the wires erected and affixed in cities and towns, as in the Dominion Act.

At the time the plaintiff John Howard was injured it does not appear that any by-law regulating the affixing of telephone wires any particular height had been passed by the council of St. Thomas.

The by-law of the city passed in 1882 appointing a city engineer does not provide what his duties shall be.

The permit for the removal of the building was given to William Lodge, employed to remove it, and is dated 14th April, 1888.

If the defendants the city of St. Thomas, are liable to the plaintiff, it is by reason that the injury he suffered is ascribable to some neglect of duty cast upon it by the section of the Municipal Act to which reference has been made.

What is "keeping in repair" a street or highway has been variously defined; but these various definitions do not disagree materially as to the meaning which should be attached to the words.

Judgment.
MacMahon,
J.

"Keeping in repair" has been said to be equivalent to keeping free from obstructions and defects against which due care can guard. "To keep free from obstruction to the free user of the highway."

In *Town of Portland v. Griffiths*, 11 S. C. R. 333, an action for negligence in not keeping the streets of Portland in repair by reason of which the plaintiff (Griffiths) was injured, Gwynne, J., in his judgment, at p. 341, says: "The gist of this species of action is negligence on the part of the defendants in committing such a breach of duty which they owed to the public as subjected them to a conviction on an indictment as for a public nuisance, from which breach of duty the plaintiff suffered the peculiar private damage complained of, without any negligence on her own part contributing to the happening of the injury."

In Harrison's Municipal Manual, 4th ed., p. 480, the question is asked: "Then what is *repair*?" and is thus answered: "It is impossible to give a definition which will apply to all cases. In general terms non-repair may be said to be any defect in a highway which renders it unsafe for ordinary travel," citing *Castor v. Corporation of Uxbridge*, 39 U. C. R. 113; *Hixon v. City of Lowell*, 13 Gray 59; *Barber v. City of Roxburg*,¹¹ Allen 318.

In *Castor v. Corporation of Uxbridge*, *supra*, telegraph poles intended for the construction of their line had been laid by a telegraph company upon the highway, encroaching upon the travelled portion; it was held that the municipal corporation was responsible for damage caused to travellers by obstructions placed upon the highway by wrongdoers, of which the corporation had or ought to have knowledge; and the road is out of repair when by the existence of such obstructions it is rendered unsafe or inconvenient for travel.

Adopting the language employed in *Castor v. Corporation of Uxbridge*, as a fair and reasonable interpretation

Judgment.
MacMahon,
J.

to put upon the 531st section of the Act as to the liability imposed upon the corporation of St. Thomas, then was the existence of the obstruction which caused the accident such as rendered the highway or street unsafe or inconvenient for travel?—by which must be understood the ordinary user of the highway by the travelling public.

It was not urged that the street was not in proper repair for ordinary travel, or that the user of the highway was in anywise impeded for ordinary traffic.

The assumed defect in the highway caused by the alleged obstruction with which the city is charged as permitting to exist, is, if a defect at all, one of a very peculiar nature, and may be properly designated as *sui generis*.

Mr. Justice Gwynne, in 1873, in *Ringland v. Corporation of Toronto*, 23 C. P. 93, at p. 99, adopts the reasoning of the Court in *Merrill v. Inhabitants of Hampden*, 26 Maine 234, that such a state of repair as would exempt the city from liability to an indictment, would also exempt them from liability in a civil action; and he refers to the language of the then section of our Act to support his view. Harrison, C. J., in 1878, in *Burns v. Corporation of Toronto*, 42 U. C. R. 560, at p. 565, thought that the then, and also the present section of the Act, was differently expressed from the section being interpreted by the Court in *Ringland v. Corporation of Toronto*, and thought the construction of Gwynne, J., too narrow. And in 1875, Hagarty, C. J., in *Boyle v. Corporation of Dundas*, 25 C. P. 420, at p. 424, while he could see no substantial difference in the legal effect of the two sections, and while seeing much to recommend the view of Gwynne, J., said that our Courts had not adopted this as a rule of decision.

The present Chief Justice of this Division, when *Burns v. Corporation of Toronto*, was before him at *nisi prius*, adopted the view of Gwynne, J. And in 1885, in *Town of Portland v. Griffiths*, 11 S. C. R. 333, at p. 341, it will be seen from the quotation already made from the judgment of Gwynne, J., that he adheres to the opinion expressed by him in *Ringland v. Corporation of Toronto*.

There has not, in my opinion, been any negligence on the part of the corporation of St. Thomas, which should render them either criminally or civilly liable, unless we could reach the conclusion that the liability attaches to them for the injury and damage to the plaintiffs by reason, as it is alleged, of the corporation allowing the wire to remain suspended across the street at nineteen and a half feet, when the law requires that it should be at least twenty-two feet above the street's surface.

Judgment.
MacMahon,
J.

The telephone company is by law allowed to have their wires across the street, and if from neglect on the part of that company in the hanging of the wires an injury happens, unless such affixing and maintaining caused such a defect or want of repair in the street as would render it unfit for the ordinary public travel, the city could not be held liable.

The cause of the accident was not by reason of the wire being only nineteen and a half feet above the surface of the street; but because the moving building was twenty-five feet high so that if those moving it impelled it against the wire the wire must have strained and eventually broken whether twenty-two or nineteen and a half feet high. The lowering of the wire below the height prescribed by the statute was not therefore the cause of the bricks being detached from the chimney of Penwarden's hotel to which the wire was attached, the falling of which bricks therefrom caused the injury complained of.

The granting of a permit for the removal of the house along the street cannot, in my opinion, make any difference in the obligation of the city. The mere granting of a permit adds nothing to the obligation which the city owes to the public using the street.

I cannot therefore discover any principle upon which the city can be held liable to the plaintiffs by reason of the injury sustained.

The telephone company by its charter is assumed to provide poles not exceeding a certain height upon which to string its wires, and to string its wires at a minimum

Judgment.
MacMahon,
J.

height of twenty-two feet above the surface of the streets. So that as long as it complied with the charter in these particulars and did not interfere with the public right of travelling on or using such highways and streets, it was lawfully in occupation of such highways for the purpose for which its Act of incorporation was granted.

If the house had not been propelled against the wire the wire would not have been strained and so detached the bricks that fell and injured John Howard. And if the telephone company had its wires on poles along the street instead of attaching it to a building there would be no danger of such an injury being inflicted as that for which the plaintiffs are suing.

Had a storm blown a tree across the wires detaching the bricks and thus causing the injury complained of there could be no question as to the liability of the telephone company to the plaintiffs. In view of the findings of the jury that the telephone company was guilty of negligence in not having its wires properly fastened to poles, then does the fact, that the defendant Oliver caused the building to be impelled against the wire and so detached the bricks, alter the position of the company so as to free it from liability to the plaintiffs?

The principle in the law of negligence upon which liability for damages depends in the class of cases we are now called upon to consider, is thus put in Wharton on Negligence, 2nd ed., sec. 134, "Supposing that if it had not been for the intervention of a responsible third party the defendant's" (the telephone company) "negligence would have produced no damage to the plaintiff, is the defendant" (telephone company) "liable to the plaintiff?" This question must be answered in the negative, for the general reason that casual connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject matter as to which I am not contractually bound. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negli-

gence injurious to a third person. If so, the person so intervening acts as a non-conductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured. I may be liable to him for my negligence in getting him into difficulty, but I am not liable to others for the negligence which he alone was the cause of making operative." The learned author gives, in section 143, the following apt illustration of the principle enunciated: "Where A makes a fire negligently, but no mischief would result were it not from the negligence of B, who by tampering with the fire causes it to spread to C's field. Here C has no claim against A, supposing B is a free and rational agent."

Judgment.
MacMahon,
J.

For the reasons stated, I think the motions of the defendants the city of St. Thomas and the Bell Telephone Company must be made absolute setting aside the judgment entered against them, and to enter judgment dismissing the action against them with costs, including the costs of the motion.

The defendant Oliver did not move against the judgment directed to be entered against him.

ROSE, J.:—

Assuming that the wire was an obstruction which the municipality should not have permitted to exist, and that, therefore, as against the city and the telephone company, it was unlawfully in its position, yet if the defendant Oliver knowing that it was there, wittingly, and in that sense, wilfully, drove against it causing the damage complained of, I cannot see that any of the defendants other than he can be held liable. The *causa causans* was not the presence of the wire but the wilful act of Oliver. Then does it appear that such was the fact as to Oliver?

It was admitted that the work of moving the house "was being performed at the time the accident took place, the defendant Oliver being also present and assisting in

Judgment.
Rose, J. the work ;" also that the house was twenty-five feet high ; and it was found that the wire was nineteen and a half feet high. It was further found that Oliver was guilty of negligence "in not seeing that the company removed all obstructions as they were supposed to do after being instructed by Oliver;" and it appears from the facts, stated in the judgment of my learned brother Street, that he, Oliver, had notified the company to lift the wires: that the men had been present to do so, but had left just before the accident occurred.

He, therefore, knew that the house could not pass without the wire being lifted, and without waiting for it to be raised up, drove against it.

In my opinion the judgment against the city and company must be set aside. The judgment against the defendant Oliver will stand. It was not moved against. The plaintiff must pay the costs of the motion, and the action as to these two defendants, the city and the company, will be dismissed with costs

GALT, C. J., concurred.

[COMMON PLEAS DIVISION.]

BRIDGES V. THE ONTARIO ROLLING MILLS COMPANY.

Master and servant—"Workmen's Compensation for Injuries Act"—*Defect in machinery*—*Negligence*—*Contributory negligence*.

The lower blade of a pair steam shears was attached by a bolt to an iron block, called the bed plate, some eight inches thick, upon which the iron to be cut was put, and along the face thereof, where the workman stood, was a guard, three inches high, under which the iron was placed and pushed forward to the shears, the only danger being when the iron became too short to allow the guard to be any protection. The bolt was too long, projecting outwards about four and a half inches, which it was urged was a defect in the machine, making it dangerous, and the cause of the accident to the plaintiff, but the evidence failed to shew it was insufficient for the purpose for which it was used, or likely to cause injury by reason of its length. The plaintiff, who had previously seen others working at the machine, was put to work at it himself, and had worked several times at it prior to the accident without injury or fear of any, the accident being caused by the piece of iron he was holding becoming too short to hold outside of the guard, and in attempting to hold it down with another piece his fingers got jammed and crushed. Evidence was given that the accident could have been avoided by the use of tongs. No instructions were given plaintiff except a warning not to let his fingers get too close to the shears:—

Held, that defendants were not liable for the accident, there being no evidence that the bolt was insufficient for the purpose for which it was used to bolt the under side of the shears to the bed-plate, or that from its length it was likely to injure a person working at the machine.

Quære, whether there was evidence of contributory negligence on the plaintiff's part.

THIS was an action tried before FALCONBRIDGE, J., and a Statement. jury, at Hamilton, at the Spring Assizes, 1890.

The action was brought under the "The Workmen's Compensation for Injuries Act," to recover damages for the loss of the plaintiff's fore-finger of his left hand.

The accident by which the plaintiff lost his finger happened while he was cutting steel scrap at a shears operated by steam in the defendants' mill.

The alleged defect in the construction of the machinery was that one of the bolts which held the lower blade of the shears in position, improperly, by the negligence of the person whose duty it was to see the shears were in proper condition, projected outwards from the bed on which the shears were secured about four and one half inches. And that while cutting said steel scrap, and without any want of care on his part, the plaintiff received the said injury to

Statement. his finger through the same being crushed between the said steel plate and the said projecting bolt.

It was also alleged there was negligence on the part of the defendants in not instructing the plaintiff in the use of the machine, he not being a skilled mechanic at that kind of work.

The learned trial Judge nonsuited the plaintiff on the ground of contributory negligence as disclosed by the evidence on his behalf; and also holding that the bolt was not a defect within the meaning of the Act.

The plaintiff moved on notice to set aside the nonsuit, and for a new trial.

In Easter Sittings, of the Divisional Court, (composed of GALT, C. J., and MACMAHON, J.,) June 6th, 1890, *Bicknell* supported the motion. The bolt was a necessary part of the machine, and its extending out or protruding through the bed plate as it did, was a defect in the machine; but even if not defective in construction, it was under the circumstances under which it was used, calculated to cause injury to those who used it. The plaintiff was not a skilled mechanic, but a mere labourer, doing what he was told to do, and had no previous experience of this work, except on one or two previous occasions, and then he merely did what he was told to do. His only instructions were to put in the scrap straight, and not to put his fingers too near the shears. He carried out these instructions, but as the piece of scrap iron became short it was of course impossible to keep his fingers from coming close to the shears, and no instructions were given him how to act after the piece became short, and in consequence of the defective character of the machine, it then became most dangerous. The immediate danger should have been pointed out to the plaintiff: *Heske v. Samuelson*, 12 Q. B. D. 30; *Cripps v. Judge*, 13 Q. B. D. 583; *Yarmouth v. France*, 19 Q. B. D. 647; *Paley v. Garnett*, 16 Q. B. D. 52. It is said he was guilty of contributory negligence in not using tongs, and that he could have got them from the blacksmith's shop; but the

defendants' themselves say they were not necessary, and therefore it cannot be deemed to be contributory negligence in not using what the defendants did not consider essential. The onus of proof of contributory negligence is on the defendants, and is a question for the jury, and on the evidence submitted to them they would have found for the plaintiff: *Wakelin v. London and South Western R. W. Co.*, 12 App. Cas. 41; *McLaren v. Canada Central R. W. Co.*, 32 C. P. 324, 343; *Grizzle v. Frost*, 3 F. & F. 622; *Corcoran v. East Surrey Iron Works Co.*, 5 Times L. R. 103.

Wallace Nesbitt, contra. This case shews how far the attempt can be made to push the Act, and to hold employers liable. To render the defendants liable here, it would be necessary to read the Act as making employers insurers against the carelessness of their workmen. The evidence shews that so long as the slightest attention is paid in feeding the machine, there is no danger. Danger can only arise through a want of care. The instructions given to the plaintiff were to be careful in feeding the machine, and to see that the fingers did not get jammed; and it is difficult to see what other instructions could be given. There was no defect in the machine, and so the learned Judge held. The plaintiff was clearly guilty of contributory negligence. His own witnesses stated that any man of ordinary common sense could use the machine without danger. The learned Judge properly withdrew the case from the jury on this ground: *Pearson v. Cox*, 2 C. P. D. 369; *Sayer v. Hatton*, 1 Cab. & E. 492; *Slattery v. Dublin, Wicklow, &c. R. W. Co.*, 3 App. Cas. 1155; *Coyle v. Great Northern R. W. Co.*, 20 Ir. C. L. R., (1887), 409, 417; *Walsh v. Whiteley*, 21 Q. B. D. 371, 378; *Hamilton v. Groesbeck*, 19 O. R. 76, 82; *Morgan v. Hutchins*, 6 Times L. R. 214; *Davey v. London and North Western R. W. Co.*, 12 Q. B. D. 70; *McEvoy v. Waterford Steamship Co.*, 18 Ir. C. L. R. (1886), 159; *Cohen v. Metropolitan R. W. Co.*, 6 Times L. R. 146.

Argument.

Judgment. June 27, 1890. MACMAHON, J. :—

MacMahon,
J.

The lower part of the shears was attached by bolts to an iron block called the bed-plate of the shears, some eight inches thick, upon which the iron or steel to be cut is placed, and along the face of this block next to which the workman is standing there is a guard about three inches high, and under this the iron or steel is put when being fed, and as it is pushed forward over the bed-plate the upper half of the shears worked by a lever comes down and cuts the iron &c., into scraps. So long as the piece of metal to be cut is covered by the guard,—*i.e.*, eight inches long,—it is not claimed there is any danger in using the machine; but the ground of action here is that it was dangerous when the metal to be fed to the shears became so short that the guard offered no protection, and that it was while cutting steel into pieces of three inches in length, and the metal was shorter than the space between the guard and the shears that the accident happened.

The plaintiff states that in order to cut the steel into such short pieces he did not use his hand to hold the metal while it was being fed to the shears, but used a longer piece of metal to keep the piece being fed to the shears on the bed-plate, and at the same time push it to the shears, and that the piece he intended to cut when the upper part of the shears came down upon it was thrown up, and the piece of metal in his hand being pressed down, his finger was caught between it and the bolt, and so injured.

Where there is any dispute as to the facts, or the inference to be drawn from the facts, where the point to be decided is whether the plaintiff has been guilty of contributory negligence conducing to the accident, is a question for the jury,

There is no dispute as to the material facts in this case. The work of cutting the metal by means of the shears was a very simple process, and the plaintiff had, prior to being put to work thereon, seen others do the work, and when he was told to go to work at cutting scrap he was warned

by the manager to be very careful and not put his fingers too near the shears or he might be injured. And the plaintiff had, on several occasions prior to the accident, worked on the shears without any accident, and apparently without fear of any accident occurring.

Judgment.
MacMahon,
J.

There appears to have been no instructions given as to any particular method to be adopted when feeding the metal to the shears after becoming too short for holding by the hand outside the guard; but from the evidence of the witnesses called for the plaintiff instead of adopting the method of holding down the piece being fed with another piece, and pushing it forward in that way, he should have gone to the blacksmith's shop and procured a pair of tongs and so fed the short pieces of metal to the shears. The evidence of these witnesses is also to the effect that most of the shears in Canada have no guards attached to the bed-plate.

It is difficult to conceive how the accident could have happened to the plaintiff by the bolt being there as he states. It is conceivable that his fingers should be crushed between the bar he was holding in his hand and the guard. But I propose to rest my judgment upon the ground that there was no defect in the machinery by reason of the bolt projecting through the bed-plate as stated.

As stated in *Heske v. Samuelson*, 12 Q. B. D. 30, the Act applies to a case where the machine though not defective in its construction is under the circumstances for which it is used calculated to cause injury to those using it. In that case the injury was caused by the falling of a piece of coke from a lift used in a blast furnace, and the evidence was that the accident arose either from the sides of the lift not being fenced so as to prevent coke from falling over, or from the lower platform not being roofed so as to protect those working on it from falling coke; and the Court held the defendants liable for such defect.

So also in the case of *Cripps v. Judge*, 13 Q. B. D. 583, where the plaintiff, a workman, was injured by reason of the breaking of a ladder which was being used to support

Judgment.
MacMahon,
J.

a scaffold. The ladder was insufficient for the purpose for which it was being used and the scaffold and ladder had been placed and were being used under the directions of the defendants, and it was held that under the circumstances there was evidence that the plaintiff had been injured by reason of a defect in the condition of the plant.

In both the above cases relied upon by plaintiff's counsel there was a defect in the plant or machinery *for the purpose for which it was being used*, and so likely to result in injury to those working about it. In the present case there is no defect in the bolt for the purpose for which it was being used, the only evidence as to its being a defect was that it was too long; but there was no evidence shewing that it was insufficient for the purpose for which it was being used to bolt the under side of the shears to the bed-plate; or that from its length it was likely to injure a person working at the machine, or that it had caused injury to anyone until the alleged injury thereby to the plaintiff.

As said in *Hamilton v. Groesbeck*, 19 O. R. 76, 82, the defect must be an inherent defect, a deficiency in something essential to the proper user of the machine.

As shewing what is a defect within the meaning of the Act the Court of Appeal in *Walsh v. Whiteley*, 21 Q. B. D. 371, at p. 379, after referring to the cases up to that date (1888), summarizes them as follows: "They are all cases where there was evidence of a defect shewing negligence of the employer. In *Heske v. Samuelson*, the lift was good, but there was negligence in not providing what was necessary to prevent the coke falling off; the machine was defective as used for coke. In *Cripps v. Judge*, the ladder was used for a purpose for which it was unfit, and was so used under the personal superintendence of one of the defendants. In *Weblin v. Ballard*, 17 Q. B. D. 122, there was evidence that the ladder was not in a proper condition for the purpose for which it was being used, and the employer knew this. In *Thomas v. Quartermaine*, 17 Q. B. D. 414, 18 Q. B. D. 685, there was no defect, and it

was held that there must be a defect shewing negligence in the employer in order to bring the case within the Act. Judgment.
MacMahon,
J.

It is not shewn there was any defect in the shears by reason of the bolt being too long, nor is there any evidence of negligence on the part of the defendants. See *Cohen v. Metropolitan R. W. Co.*, 6 Times L. R. 146.

Kite v. London Tramway Co., (as reported in the *London Times*)* was referred to on the argument, and report handed in to us by counsel, is very much in point, and I therefore append the judgment in full: (the learned Judge set out the judgment *infra*.†

In the more recent case of *Morgan v. Hutchins*, 6 Times L. R. 219, it was held that the absence of fencing around dangerous machinery used by children or young persons constitutes a "defect" in the condition of the machinery within the meaning of the section of the Employers Liability Act of 1880. But it appeared that the Inspector of Factories had in 1885 warned the defendants against employing young persons at the machine, as if the cogs were not covered it was dangerous to adults and far too

*Reported in the "Times," 30th January, 1890, but not published in the Times Law Reports.

†This was an appeal from the Lambeth County Court.

The action was brought under the Employers' Liability Act by the plaintiff who was a sawyer engaged in the workshops of the defendants.

While working with a steam planing machine under the orders of the defendants' foreman, the piece of wood which he was planing flew out of his hand, and his hand was brought into contact with the machine, and so much lacerated that some of his fingers had to be amputated.

The jury found that the planing machine could, by the use of blocks or guards, be used so as to protect the hands of the workmen using it, and that this company were negligent in not providing such blocks or guards. They further found that the plaintiff did know of the danger of using the machine, and had spoken to the foreman about it, and that he voluntarily undertook the work at the foreman's request. They were also of the opinion that the accident did not happen either in consequence of any defect in the machinery, or from any careless user of it by the plaintiff, but they thought it might have been prevented by the use of blocks or guards. They assessed the damages at £100.

The Judge held on these findings that judgment must be entered for the defendants, on the ground that the plaintiff knew of the danger and

Judgment. much so for youths under sixteen to be employed at. The
MacMahon, person injured in it was a boy thirteen years old.
J.

This is not a case in which if it had gone to the jury on the evidence adduced on behalf of the plaintiff and the jury had found in his favour that it could be permitted to stand. See *Pritchard v. Lang*, 5 Times L. R. 639.

The motion must be dismissed with costs.

voluntarily incurred it; and he was further of opinion that there was no evidence on which the jury could find that the defendants were negligent in not providing blocks or guards, or that it was customary to do so.

The plaintiff appealed.

Mr. Bassett Hopkins, appeared for the plaintiff.

Mr. G. E. Lyon, for the defendants.

The Court dismissed the appeal.

LORD JUSTICE FRY said that the Judge was quite right. There was no evidence of negligence on the part of the defendants. The negligence relied upon by the plaintiff was that the defendants did not provide him with a guard to protect his hand when using the machine. There was no evidence whatever that the guard could be used when this particular work was being done, and the defendants adduced evidence to shew that it was impossible to use it then. There was, therefore, an entire deficiency of evidence to support the finding of the jury. Then it was said that the defendants were guilty of negligence in taking a working sawyer and putting him to work this dangerous machine, but the evidence shewed that he had been taught by the foreman how to use it, and that he had used it several times before without any accident.

MR. JUSTICE MATHEW concurred.

[COMMON PLEAS DIVISION.]

McMICHAEL V. WILKIE ET AL.

*Husband and wife—Purchase by wife subject to mortgage—Separate estate
—Liability of wife to indemnify grantor.*

A married woman to whom land is conveyed, subject to incumbrance, whether by way of purchase or exchange, is bound to indemnify her grantor against the payment of such incumbrance, and the property so conveyed to her is separate estate with respect to which such obligation arises.

Decision of MACMAHON, J., reversed.

THIS was an action tried before MACMAHON, J., with-Statement.
out a jury, at Toronto, at the Winter Assizes of 1889.

The learned Judge reserved his decision, and subsequently delivered the following judgment in which the facts are fully stated :

August 1, 1889. MACMAHON, J.:—

In August, 1884, the defendant Wilkie mortgaged to the plaintiff certain real estate in Manitoba to secure the payment of \$500 in three years, and interest at eight per cent., which had not been paid.

In March, 1885, the defendant Wilkie exchanged the lands mortgaged to the plaintiff, and other lands in Manitoba subject to the mortgages existing thereon, with the defendant Morton, for lands on Gerrard street, in Toronto, subject to the mortgages thereon existing, and there was much more due on the mortgages on the Morton property than on the property mortgaged by Wilkie.

It is alleged in the statement of claim that it was agreed between the defendants Wilkie and Morton that each should pay the mortgages on the properties which each took in exchange for the other, and save and indemnify each other in respect of and from the payments thereof; and that Wilkie had paid off the encumbrances on the property conveyed by the defendant Morton; and Wilkie claims

Judgment. that the defendant Morton should pay the encumbrances
MacMahon, on the land which he had mortgaged to the plaintiff.
J.

The plaintiff also sets up in his statement of claim that at the time he took the said mortgage it was to have been made by the defendant McCord; and, upon his agreeing to become liable for the amount secured, the plaintiff accepted the mortgage from Wilkie, and by an agreement, dated the 7th of April, 1885, McCord covenanted to pay to the plaintiff the said sum of \$500, and interest at eight per cent., at the times agreed upon by the mortgage.

The plaintiff claims that all the defendants are liable to him for the payment of the \$500 and interest as stated.

The defendant Wilkie in his statement of defence sets up that in pursuance of the agreement for exchange between himself and the defendant Morton the latter conveyed to him her property agreed to be exchanged for the expressed consideration of \$9,000, subject to three mortgages thereon, which he agreed to assume and pay off; and he retained that sum out of the purchase money for the purpose of paying off said mortgages, which he did pay and satisfy: that, in consideration of \$4,500, he (Wilkie) in April, 1885, conveyed to the defendant Mary S. Morton, the two properties in Manitoba agreed to be exchanged, (one of which is the property mentioned in the plaintiff's statement of claim) the said mortgages on which the defendant Morton agreed to assume, and out of the said purchase money she retained the amount necessary to pay off said mortgages; and that, in pursuance of such agreement, the defendant Morton paid to the plaintiff the interest on the mortgage sued on up to the time of the maturity thereof, but has since refused to pay either principal or interest on said mortgage.

The defendant Wilkie claims that an order should be first made against the defendant Morton for the payment of the mortgage debt and interest herein; or, if he should be ordered to pay the same, that the defendant Morton should be decreed to repay the same to him.

The defendant Morton says she is a married woman;

and that if she agreed to indemnify the defendant Wilkie, she did not thereby become liable to the plaintiff as claimed. She also alleges that notice of intention to exercise the power of sale under the mortgage was served upon her, and that this action was brought without first obtaining the order required by R. S. O. ch. 102, sec. 30.

Judgment.
MacMahon,
J.

The consent of the defendant McCord was filed, admitting that the plaintiff was entitled to judgment against him. The plaintiff is entitled to judgment against the defendant Wilkie on his covenant.

There will therefore be judgment for the plaintiff against the defendants Wilkie and McCord for the sum of \$500, with interest thereon at eight per cent., from the 11th February, 1887, together with the full costs of suit.

The offer of the defendant Morton, after describing the Gerrard street property and enumerating the encumbrances thereon, when the same were payable, and the rates of interest on the different mortgages, stated:

"I agree to give, and the above properties to be taken subject as above to \$5,400, in even exchange for the lands in Manitoba (describing them). The first parcel 260 acres being subject to a mortgage for \$500, bearing interest at eight per cent. * * and the second parcel, 320 acres, being subject to a mortgage for \$800, bearing interest at seven per cent. * *"

which was signed B. MORTON, attorney for M. S. MORTON.

The offer of the defendant Wilkie, was in these terms:

"Toronto, March 11, 1886.

"I hereby accept the attached offer of Mr. B. Morton of his Gerrard street property for my Manitoba lands, each property subject to the encumbrances thereon named."

The deed from Wilkie to Morton of the land covered by the plaintiff's mortgage, is expressed to be in consideration of \$2,000. "To have and to hold subject to the reservations," &c., "expressed in the original grant thereof from the Crown, and subject also to a certain mortgage on the said lands to one Charles McMichael * * of \$500, falling due in three years from the date thereof, and bearing interest at eight per cent. per annum." Quiet possession, free from all encumbrances except as above stated.

Judgment. The consideration mentioned in the deed of the other
MacMahon, parcels is \$2,560, with *habendum* same as in above deed
J. subject to a mortgage for \$800 and interest.

Counsel for Mrs. Morton urged that she by these conveyances had assigned to her the equity of redemption in the lands—in fact that as between Wilkie and Mrs. Morton there was merely an exchange of the equities in these different properties; and that as the assignee of such equity she could not be made liable for the payment of the encumbrance.

From the agreement and the conveyances it must be taken that the conveyance from one party to the other of their respective lands subject to respective encumbrances then existing thereon, was considered and accepted by the parties as an equal exchange.

As to the effect of an exchange where one of the parties thereto covenants to pay off an encumbrance created by him on the property which he conveyed, see *Seney v. Porter*, 12 Gr. 546.

The case of *Re Crozier—Parker v. Glover*, 24 Gr. 537, was cited as an authority entitling the plaintiff to judgment against the defendant Morton. That case, as pointed out by Mr. Armour, was an administration suit, and I would prefer considering the decision in that case as being founded upon the ground stated by Proudfoot, V. C., at p. 545, “for the whole real and personal estate goes to the same person, and by his will the testator has charged his whole estate with his debts. As it seems this is to be considered a debt, then he has charged it on all his estate, and the plaintiffs must take the estate with the charge” than upon the other grounds stated in the judgment.

Nichols v. Watson, 23 Gr. 606, and *Clarkson v. Scott*, 25 Gr. 33, are but for the exceptional circumstances connected with *Re Crozier*, opposed to the latter authority.

It appears to me that *Clarkson v. Scott* is the authority which should be followed; and in doing so I must hold that the plaintiff is not entitled to judgment against the defendant Morton.

Where a mortgagor who has absolutely assigned his equity of redemption is sued by the mortgagee, he is entitled on paying the mortgage money to a reconveyance to himself: *Kinnaird v. Trollope*, 39 Ch. D. 636-645.

Judgment.
MacMahon,
J.

Were it not for the other grounds, to which I shall presently refer, as relieving the defendant Mrs. Morton from all personal liability to discharge the encumbrance on the lands conveyed to her by Wilkie, I should have held on the authority of *Campbell v. Robinson*, 27 Gr. 634, and the cases there cited, that Wilkie was entitled to judgment against her, indemnifying him against all damages by reason of his having to pay the plaintiff the amount of the mortgage money and interest as represented by the judgment in this action.

The agreement under which the exchange of properties between the defendants Wilkie and Morton was effected, was executed under a power of attorney from Mrs. Morton to her husband Benjamin Morton, under which he is empowered as her attorney to "sell and absolutely dispose of all or any part or parts of my real estate, lands and hereditaments by public auction, tender or private contract, either together or in parcels, for such price or prices as to my attorney may deem expedient; and for that purpose to sign, seal, execute and deliver all agreements, contracts, conveyances and other documents necessary, and to receive and take the purchase money therefor, or any part thereof, and to give good receipts, acquittances and discharges therefor; and generally to act in relation to the said real estate, lands and hereditaments as fully and effectually in all respects as I could do if personally present, hereby ratifying and confirming, and agreeing to ratify and confirm whatsoever my said attorney shall do in the premises by virtue of these presents."

The conveyance to the defendant Wilkie of the Gerrard street property, was executed by Benjamin Morton as attorney for his wife, he joining in the conveyance as a party thereto.

There is nothing in the power of attorney authorizing

Judgment.
MacMahon, J. the attorney to bind Mrs. Morton in any way so that she could be called upon to indemnify Wilkie against the payment of the encumbrance created by him on this property.

Wilkie must be taken to have notice of the limited authority of the agent, as the agreement and deed were executed by Morton in that capacity.

The defendant Morton pleaded she was a married woman at the time the contract was entered into.

The plaintiffs have not replied that she has separate estate, nor was there any evidence that such separate estate existed, so that, until that is proved, no judgment could be given in favor of the defendant Wilkie over against the defendant Morton indemnifying him (Wilkie) against the payment of the mortgage money and interest.

The last case under the Married Woman's Property Act is *Moore v. Jackson*, in the Court of Appeal (not yet reported)* where Burton, J.A., says: "To enable the plaintiff, therefore, to recover he was bound to allege and prove the existence of some separate property at the time of entering into the alleged contract; and having failed to do so, has not made out a case for recovery."

As to the notice of sale. I do not think the plaintiff was too late in answering the letter of the solicitor of Mrs. Morton, and is bound by the offer made and accepted.

There will be judgment for the plaintiff against the defendants Wilkie and McCord, as stated; and there will be judgment for the defendant Morton dismissing the action against her with costs.

The defendant Wilkie moved on notice to set aside the judgment dismissing the action as against the defendant Morton, and to enter judgment in his favour as against her.

In the Michaelmas Sittings of the Divisional Court, (composed of GALT, C.J., ROSE and MACMAHON, J.J.) 1889, *J. B. Clarke*, Q. C., supported the motion.

McMichael, Q. C., for the plaintiff, and *E. D. Armour*, Q. C., for the defendant Morton, contra.

*Since reported 16 A. R. 431.

June 27, 1890. ROSE, J.:—

Judgment.

Rose, J.

The facts are fully set forth in the judgment of my learned brother MacMahon.

The pleadings have not been amended according to leave granted, nor is there any record of the order directing the trial of the issue raised between the defendants Wilkie and Morton.

Assuming, however, that it has been stated that Mrs. Morton had separate estate, and further assuming that the trial of the issue between the two said defendants was directed, then the only question for our consideration is whether Mrs. Morton is liable to pay the plaintiff's mortgage so as to free Wilkie from his liability. The plaintiff accepts the judgment dismissing the action against Mrs. Morton, and the judgment in the plaintiff's favour against Wilkie and McCord, has not been moved against.

With reference to Wilkie's claim against Mrs. Morton, the facts may be stated very briefly. In 1885, Mrs. Morton purchased from Wilkie land in Manitoba for an expressed consideration of \$2,000, subject to the plaintiff's mortgage for \$500. If she had then been a *feme* sole there would have arisen immediately upon her becoming owner of the estate an obligation to indemnify the vendor against the personal obligation to pay the money due upon the vendor's transaction of mortgage: *Waring v. Ward*, 7 Ves. 337, cited in *Campbell v. Robinson*, 27 Gr. 634, at p. 635.

The obligation to pay arises upon the creation of the ownership as stated in *Jones v. Kearney*, 1 D. & W. 155, also cited in *Campbell v. Robinson*, at p. 636: "If I create an incumbrance on my estate and sell, and no engagement be entered into with respect to that incumbrance, but I convey the estate subject to it, the purchaser is bound in equity to indemnify me against such incumbrance."

And in *Waring v. Ward*, such obligation was said to arise upon receipt of possession and profits.

Then here Mrs. Morton took a conveyance of the land subject to the mortgage. The estate vested in her; the

Judgment.

Rose, J.

\$2,000 were paid—that it was by exchange of land seems quite immaterial, see *Seney v. Porter*, 12 Gr. 546—surely she had separate estate with respect to which she might reasonably be deemed to have contracted.

Of course if Wilkie against whom judgment has gone, paid the debt, he would be entitled to enforce the security against the land, but as pointed out in *Campbell v. Robinson*, at p. 636, he had also the clear right to call upon Mrs. Morton to pay the debt.

The following cases may be referred to, for although none of them decides the point in question the discussion of the principles may be interesting in the consideration of the point now under investigation: *Dobbin v. Dobbin*, 11 O. R. 534; *Corby v. Gray*, 15 O. R. 1; *Dominion Loan and Investment Co. v. Kilroy*, 14 A. R. 468; *Leak v. Driffield*, 24 Q. B. D. 98, and cases there cited.

See also *Ambrose v. Fraser*, 14 O. R. 551, at pp. 554-5, as to liability of a married woman arising by implication of law in the absence of contract.

In my opinion there must be judgment in favour of Wilkie against Mrs. Morton for the amount of the debt and costs of this action which he is called upon to pay, except in so far as they have been increased by his defending the plaintiff's claim.

In the view I have taken of the matter I have not found it necessary to consider the question raised as to the power of attorney, because it seems to me clear Mrs. Morton must be held on the evidence to have accepted the deed in its terms.

I quite agree with my learned brother that the defence of notice of sale given previous to the action, failed.

GALT, C. J., concurred with ROSE, J.

MACMAHON, J., dissented, adhering to the judgment delivered by him at the trial.

[COMMON PLEAS DIVISION.]

BELAND V. L'UNION ST. THOMAS.

Benevolent society—Expulsion of member without notice—Natural justice.

A society, incorporated under the Benevolent Societies' Act, for affording assistance to members in case of illness or death, by one of its rules provided for the expulsion of any member who "kept irregular and intemperate conduct" after notice to amend. On complaint made to the society that the plaintiff, a proprietary member, was guilty of such conduct, notice was sent him directing him to amend or be subject to expulsion, and a resolution was subsequently passed expelling him, and his name was erased from the society's books. No notice of the intention to move for his expulsion was given, or any opportunity afforded him of being present and explaining his conduct :—

Held, that the expulsion was illegal as being contrary to natural justice, and the resolution therefor null and void.

THIS was an action brought by the plaintiff claiming an Statement.
order for the rescission of a resolution expelling the plaintiff from the society, and to restrain the defendants from so doing, and for damages.

The action was tried before ROSE, J., and a jury at Ottawa, at the Spring Assizes of 1890.

J. McVeity, for the plaintiff.

N. F. Belcourt, for the defendant.

The defendant society was incorporated under R. S. O. ch. 172, the "Act respecting Benevolent, Provident and other Societies," with the object of providing relief for a member in case of sickness, and assistance to his widow or orphans, in case of death.

According to the rules of the society a person on becoming a member was bound to pay an initiation fee, and thereafter a certain weekly sum, and a further sum upon the death of any member, and thereby became entitled in case of sickness or death, to the benefits and advantages provided for by the rules.

By-law 79 provided for the expulsion of any member who "kept irregular and intemperate conduct," and continued therein after notice to amend.

Statement.

In the year 1877, the plaintiff became a member of the society, and continued as such, paying all fees and dues required of him up to the time of his expulsion.

On the 3rd December, 1888, the plaintiff was named by another member, to the president as infringing the rules by "keeping irregular and intemperate conduct," whereupon the president brought the matter before the executive committee which met on that day. At a meeting of the executive committee, held on the 10th December, the plaintiff's case was taken up, and it was decided to notify him to amend his conduct or be subject to expulsion; and at a meeting of the society held on the same day, the secretary was directed to so notify the plaintiff, which he did. The matter was then handed over to a committee of enquiry.

No further action was taken in the matter until the 16th September, 1889, when at a meeting of the society held on that day, the committee of enquiry reported that the plaintiff had not amended his conduct, and recommended his expulsion. This was voted on and carried on a division, and the plaintiff was accordingly expelled, and his name erased from the books of the society.

The notice above mentioned was the only one sent to the plaintiff, and he was not present or called upon to attend any of the meetings when his case was under consideration, the resolution expelling him being passed in his absence without any knowledge of the proceedings about to be taken in the matter, and without an opportunity of answering the charge.

After the 3rd December, 1888, the plaintiff had attended three or four of the meetings of the society, but no reference was then made to his case, either by himself or any of the members then present.

On the 7th October, 1889, the plaintiff's solicitor wrote to the society demanding the plaintiff's reinstatement, and on the refusal of the society to comply therewith, this action was brought.

The plaintiff in his evidence expressly denied the charge.

The defendant set up that the plaintiff was expelled *Statement.* under the rules ; and that the society had sole jurisdiction in the matter, and that this Court had no power to interfere.

At the close of the case, the learned Judge reserved his decision, and subsequently delivered the following judgment.

May 2, 1890. ROSE, J. :

It is clear that the plaintiff has an interest in the property of the club, *i.e.*, the moneys contributed, collected and deposited or invested for the benefit of the members. See *Baird v. Wells*, W. N. March, 1890, p. 65, and cases there cited of *Forbes v. Eden*, L. R. 1 H. L. Sc. 569, at p. 581, and *Rigby v. Connol*, 14 Ch. D. 482, at p. 487.

So the Court has jurisdiction to enquire into the propriety of the plaintiff's expulsion.

The sole question is whether the plaintiff was entitled to notice of the intention to move for his expulsion.

The rule of the Society, 79, does not in terms provide that notice shall be given ; but, as stated in *Kerr on Injunctions*, Black. ed., sec. 563, "It would be a denial of natural justice if a decision was come to expelling a man without giving him an opportunity of stating his case and defending his conduct. Where the conduct of one of its members is impugned, notice ought to be given to that member that his conduct is about to be inquired into, in order that he may have an opportunity of stating his case and defending his conduct."

This language is well warranted by the cases cited. I refer especially to the case of *Fisher v. Keane*, 11 Ch. D. 353, which I am unable to distinguish in principle from the present case.

Here the plaintiff denies the truth of the charge. I have not to enquire into that ; but it shews that he ought not to have been convicted without an opportunity of making his defence.

Judgment.

Rose, J.

Although no rule may have been violated by not giving him notice of the intention to move for his expulsion, and although the action of the society may have been *bonâ fide* and nothing appears to justify any question as to *bona fides*, yet, in my opinion, the expulsion without notice was contrary to natural justice, and the resolution declaring it null and void.

Mr. Belcourt urged that the concluding paragraph of rule 79 gave the power to expel without notice. I think it refers to a case of relapse after the charge of misconduct referred to in the preceding portion of the rule.

Even if it did so provide, it would not make the action any more consistent with natural justice.

There must be a declaration that the expulsion was illegal, and the resolution null and void. The plaintiff remains, therefore, as he has always been, notwithstanding such action, a member of the society, and entitled to all the rights and privileges of membership.

The order for an injunction will go restraining the society from interfering with his right of membership.

The plaintiff must have his costs, but I do not think it a case for damages.

A DIGEST

OF

ALL THE CASES REPORTED IN THIS VOLUME

BEING DECISIONS IN THE

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OF THE

HIGH COURT OF JUSTICE FOR ONTARIO.

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AGREEMENT.

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ALIMONY.

*Registration of judgment for—
Assignment by defendant for general
benefit of creditors—Priorities—R.
S. O. ch. 44, sec. 30—R. S. O. ch.
124, sec. 9.]—The precedence given
to an assignment for the general
benefit of creditors by R. S. O. ch.
124, sec. 9, over “all judgments and
all executions not completely exe-
cuted by payment” does not extend
to a judgment for alimony registered
under R. S. O. ch. 44, sec. 30, against
the lands of a defendant prior to the
registration of an assignment by
him; and the plaintiff in such a*

judgment is not obliged to rank with the other creditors of the defendant. *Abraham v. Abraham et al.*, 256.

ANIMALS FERÆ NATURÆ.

Property in by owner of land where found.—See GAME.

See, also, HUSBAND AND WIFE, 1.

ASSESSMENT AND TAXES.

Life Insurance Company—Head office and branch office—Meaning of “branch” or “place of business” in Assessment Act—Assessment of income at branch office—“Personal property”—R. S. O. 1887, ch. 193, sec. 2, sub-sec. 10, secs. 34-35.—The defendants were a life insurance company with their head office at H., in this Province, and transacted business by agents in K., who received applications for insurances which they forwarded to the head office, from which all policies issued ready for delivery, the premiums on the same also being collected by the agents in K. In an action by the corporation of the city of K., to recover taxes, assessed against the defendants on income, it was contended that the defendants' only place of business was in H. and that their business was of such a nature that they could not be assessed at K., and that they had elected under R. S. O. 1887, ch. 193, sec. 35, sub-sec. 2 to be assessed at H. on their whole income.

Held, reversing the decision of FERGUSON, J., 18 O. R. 18, that the agency at K. was not a branch business within the meaning of sec. 35 above referred to, and that the

premiums received year by year at K. were not assessable there.

The ultimate profit represents the year's taxable income under the statute, but this could only be ascertained by placing the sum total of gains and losses against each other, together with the result of the volume of business done at the head office, and no distinct integral part of this income was referable to the K. agency.

Semble, also, that notwithstanding sub-sec. 10 of sec. 2, “personal property” in sections 35 and 36 of the above Act is intended to cover only something readily and specifically ascertainable, and “income” an intangible and invisible entity is not to be read into these provisions of the Act.

Lawless v. Sullivan, 6 App. Cas. 373, specially referred to. *The Corporation of the City of Kingston v. The Canada Life Assurance Company*, 453.

ASSIGNEE.

Action by to set aside a mortgage to a creditor.—See BANKRUPTCY AND INSOLVENCY, 1.

Power of assignee for creditors to compromise claims.—See BANKRUPTCY AND INSOLVENCY, 4.

ASSIGNMENT.

For the benefit of creditors.—See BANKRUPTCY AND INSOLVENCY, 2.

BANKRUPTCY AND INSOLVENCY.

1. *Insolvent debtor—Mortgage to creditor—Action by assignee under*

R. S. O. ch. 124, to set aside—Notice or knowledge of insolvency.]

Held, following *Johnson v. Hope*, 17 A. R. 10, that an assignee for the benefit of creditors under R. S. O. ch. 124, suing to set aside as void a mortgage of real estate made by his assignor when in insolvent circumstances, to a creditor, must, in order to succeed, establish that the creditor knew at the time he took the mortgage that the mortgagor was insolvent and unable to pay his debts in full. *Lamb v. Young*, 104.

2. *Assignment for benefit of creditors—R. S. O. ch. 124—Valuing security—Guaranty, construction of.]*—A deceased person, of whom the plaintiff was executor, gave the defendant a guaranty in respect of goods sold and to be sold to another, in the following terms:—"I hereby undertake to guarantee you against all loss in respect of such goods so sold or to be sold, provided I shall not be called on in any event to pay a greater sum than \$2,500."

The principal debtor, being indebted to the defendants in \$5,500, made an assignment under R. S. O. ch. 124, and the defendants filed a claim with the assignee but did not in the affidavit proving the claim state whether they held any security or not. At a later date the plaintiff paid the defendants the \$2,500 and filed a claim with the assignee. The dividends from the estate were insufficient to pay the balance of the defendants' claim:—

Held, that the guaranty was not a security which the defendants were required to value under the Act, and that the omission from their claim of a piece of information which could not affect it did not render it invalid:—

Held, also, that this was a guar-

anty, not of part, but of the whole of the debt, limited in amount to \$2,500, that is, a guaranty of the ultimate balance after all other sources were exhausted; and the plaintiff was not entitled to rank upon the estate in respect of the \$2,500, nor to recover any part of any dividend which the defendants had received,

Hobson v. Bass, L. R. 6 Ch. 792, distinguished; and *Ellis v. Emmanuel*, 1 Ex. D. 157, followed. *Martin v. McMullen et al.*, 230.

[Reversed by the Divisional Court.]

3. *Insolvent debtor—Mortgage to creditor—Preference—Notice or knowledge of insolvency—R. S. O. ch. 124, sec. 2.]*—A farmer mortgaged his farm to secure a debt due by him to the mortgagee and a small sum advanced at the time the mortgage was made. He knew at the time he made the mortgage that he was unable to pay his debts in full, and that he was giving the mortgagee a preference over his other creditors. The practical effect was that the mortgagee was paid in full, and that the rest of the creditors received nothing. The mortgagee, however, was not aware at the time he took the mortgage that the mortgagor was in insolvent circumstances.

Held, following *Johnson v. Hope*, 17 A. R. 10, that the mortgage was not void against creditors, under sec. 2 of R. S. O. ch. 124. *Gibbons v. McDonald et al.*, 290.

4. *Assignee for creditors—Power of assignee to compromise claims—Leave to creditor to bring action—R. S. O. (1887) ch. 124.]*—A plaintiff, a creditor, served a notice on an assignee for creditors, pursuant to R. S. O. (1887), ch. 124, sec. 7, subsec. 2, requiring him to take pro-

ceedings to set aside a certain bill of sale made by the insolvent and afterwards served on him a notice of motion for an order giving him, the creditor, permission to bring the action. After being served with this notice, however, the assignee, believing that he had authority to do so, with the approval of a majority of the inspectors and creditors present at a meeting called for the purpose, made a settlement with the grantee of the bill of sale, which settlement, it also appeared, was advantageous to the estate. The plaintiff then, pursuant to his notice of motion, obtained an order from a Judge, giving him leave to bring this action impeaching the bill of sale, without, however, the settlement being brought to the notice of the Judge:—

Held, that the settlement was valid and binding. *Keyes v. Kirkpatrick*, 572.

BANKS AND BANKING.

Warehouse receipt—Wheat converted into flour—Following moneys representing such flour—R. S. C. ch. 120, sec. 56.—A miller gave a warehouse receipt to a bank on some wheat “and its product” stored in his mill for advances made to him and died insolvent about two months after. During this period wheat was constantly going out of and fresh wheat coming into the mill. Just before his death the bank took possession and found a large shortage in the wheat which had commenced shortly after the receipt had been given and had continued to a greater or less degree all the time.

In the administration of his estate it appeared that during the period of the shortage some of the wheat

had been converted into flour which had been sold and the proceeds, which were less than the value of the shortage paid to the administrator:—

Held, that the bank was entitled to the purchase money of the flour. *Re Goodfellow, Traders’ Bank v. Goodfellow*, 299.

BENEVOLENT SOCIETY.

Expulsion of member without notice—Natural justice.—A Society, incorporated under the Benevolent Societies’ Act, for affording assistance to members in case of illness or death, by one of its rules provided for the expulsion of any member who “kept irregular and intemperate conduct” after notice to amend. On complaint made to the society that the plaintiff, a proprietary member, was guilty of such conduct, notice was sent him directing him to amend or be subject to expulsion, and a resolution was subsequently passed expelling him, and his name was erased from the society’s books. No notice of the intention to move for his expulsion was given, or any opportunity afforded him of being present and explaining his conduct:—

Held, that the expulsion was illegal as being contrary to natural justice, and the resolution therefore null and void. *Beland v. L’Union St. Thomas*, 747.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. *Notes given for purchase of patent—Endorsement of words “given for a patent right”—Necessity for as between maker and payee—Waiver—*

R. S. C. ch. 123, secs. 12-14.]—The statute R. S. C. ch. 123, secs. 12-14, which requires notes given for the purchase of a patent right, before being issued, to have the words "given for a patent right," written or printed thereon, provides that the endorsee or transferee of a note with such words thereon shall have the same defence as would have existed between the original parties, and subjects to indictment, any one issuing, selling or transferring such notes without such words written thereon.

One of the plaintiffs gave two notes to the defendant for the purchase money on the assignment of a patent right on which the required words were written. These notes were subsequently cancelled, and in lieu thereof the notes in question were given, made by both plaintiffs without having the said words thereon:—

Held, that the notes were enforceable by defendant, these words not being required as between maker and payee, and, even if they were, the makers had the right to and did waive having the same thereon. *Girvin v. Burk*, 204.

2. *Non-negotiable promissory note—Endorsement of—Character in which endorsement is made.*]—Where a non-negotiable promissory note, given for money lent to a firm, is made by one member thereof and endorsed by the other, the character in which the endorsement is made, will be implied from the purposes for which the note is given, the endorsement obtained, and the particular circumstances of the case, which were here held to make such indorser liable as guarantor. *McPhee v. McPhee et al.*, 603.

BILLS OF SALE AND CHATTEL MORTGAGES.

Mortgage of goods to secure wife barring dower—Payment of money into Court—Chattel Mortgage Act—Interpleader—R. S. O. 1887, ch. 125, sec. 6.]—A husband executed to his wife a chattel mortgage to secure her against loss by reason of her having barred her dower in certain mortgages of land. The goods were seized by his execution creditors, claimed by her, and sold pending interpleader proceedings. The husband was still living:—

Held, that the money, the proceeds of the goods, must remain in Court to abide further order, so that the wife could have the same security that she had by the mortgage; and if she should not hereafter become entitled to the money, it would be available to the husband's creditors:—

Held, also, that the chattel mortgage was valid, notwithstanding anything in R. S. O. 1887, ch. 125, sec. 6. *Morris v. Martin*, 564.

BOND.

For performance of duties as Registrar.]—See REGISTRY LAWS, 2.

BONDHOLDERS.

Rights of to property of Railway Companies.]—See RAILWAYS, 5.

Breach of promise of marriage.]—See HUSBAND AND WIFE, 2.

BY-LAW.

Authorizing the taking of gravel without specifying lands.]—See MUNICIPAL CORPORATIONS, 2.

Proof of.]—See JUSTICE OF THE PEACE, 1.

See also MUNICIPAL CORPORATIONS,
3. TAVERNS AND SHOPS.

CASES.

Brown v. McLean, 18 O. R. 533, specially considered.]—See REGISTRY LAWS, 3.

Croskery, Re, 16 O. R. 207, followed.]—See DOWER.

Corham v. Kingston, 17 O. R. 432, approved and followed.]—See MORTGAGOR AND MORTGAGEE.

Dominion Bank v. Oliver, 7 O. R. 432, followed.]—See MORTGAGE, 2.

Ellis v. Emmanuel, 1 Ex. D. 157, followed.]—See BANKRUPTCY AND INSOLVENCY, 2.

Fletcher v. Rylands, L. R. 1 Ex. 282; L. R. 3 H. L. 330, applied.]—See HUSBAND AND WIFE, 1.

Furnival v. Brooke, 49 L. T. N. S. 134, followed.]—See SEDUCTION.

Harper v. Charlesworth, 4 B. & C. 574, considered.]—See LANDLORD AND TENANT.

Henderson v. Killey, 14 O. R. 149, cited and relied on.]—See PARTNERSHIP, 3.

Hobson v. Bass, L. R. 6 Ch. 792, distinguished.]—See BANKRUPTCY AND INSOLVENCY, 2.

Johnson v. Hope, 17 A. R. 10, followed.]—See BANKRUPTCY AND INSOLVENCY, 1, 3.

Lawless v. Sullivan, 6 App. Cas. 373, specially referred to.]—See ASSESSMENT AND TAXES.

Moore, In re, McAlpine v. Moore, 21 Ch. D. 778, distinguished.]—See EXECUTORS AND ADMINISTRATORS.

Murphy v. Phillips, 35 L. T. N. S. 477, distinguished.]—See MASTER AND SERVANT, 2.

Murray v. Dawson, 17 C. P. 588, followed.]—See WATER AND WATERCOURSES, 3.

O'Byrne v. Campbell, 15 O. R. 339, distinguished.]—See WATER AND WATERCOURSES, 3.

Regina v. Wright, 14 O. R. 668, followed.]—See CONVICTION.

Rist v. Faux, 4 B. & S. 409, specially referred to.]—See SEDUCTION.

Thompson v. Ross, 5 H. & N. 16, distinguished.]—See SEDUCTION.

Wells v. Maxwell, 32 Beav. 552, followed.]—See SALE OF LAND, 1.

CHATTEL MORTGAGES.

See BILLS OF SALE AND CHATTEL MORTGAGES.

COMPANY.

1. *Winding-up proceedings*—*Infant stockholder repudiating liability as contributory*—*Laches*—*Acquiescence*.]—The petitioner's father signed her name to a stock subscription book of a bank, paid the calls, and received the dividend cheques, which were endorsed by her at her father's request, the moneys being received

by him. The Bank was put into liquidation by winding-up proceedings, and the order for call against contributories was made three months before she came of age.

A year after the liquidation commenced she took proceedings to have her name removed from the list of contributories:—

Held, that she was not liable as a contributory, and that her name must be removed from the list. *Re Central Bank and Hogg*, 7.

2. *Director — Fiduciary capacity* — *Purchase by director of property of company sold under mortgage — Liability to account — Breach of trust — Winding-up Act, Dominion and Provincial — Constitutional law — R. S. C. ch. 129, sec. 83 — R. S. O. 1887, ch. 183.*]—A director of a joint stock company, having a judgment and execution of his own against the property of the company acting in good faith, purchased the same at a sale by mortgagees, under a power of sale for \$8,400, and sold it in the following year for \$23,000:

Held, in winding-up proceedings, that he could not purchase for his own benefit, but held the land as trustee for the company, and was accountable for any profit received on a re-sale, and by reason of his refusing to pay over or account for such profits, and in fact by his appearing as a bidder at the sale and so damping the bidding, was guilty of a breach of trust within R. S. C. ch. 129, sec. 83.

Semle, notwithstanding the Act, 52 Vic. ch. 32 (D.), amending the Dominion Winding-up Act, the Ontario Winding-up Act, R. S. O. 1887, ch. 183, does not apply to a company incorporated in Ontario where application to wind up is made on the ground of insolvency, because

local legislatures have no jurisdiction in matters of bankruptcy or insolvency. *Re Iron Clay Brick Manufacturing Company — Turner's Case*, 113.

COMPENSATION.

Default in paying.]—See RAILWAYS, 1.

CON. RULES.

218.]—See COURTS.

261, 313.]—See SEDUCTION.

CONTRACT.

Statute of Frauds — Extrinsic parol evidence as to parties — Specific performance.]—Although extrinsic parol evidence may be given to indentify one of the parties, it cannot be given to supply information as to the person to whom an offer in a memorandum required to be in writing by the Statute of Frauds was made or for whom it was intended.

And where an offer, signed by the defendant, to exchange a stock of goods for land did not in any way designate the person to whom it was supposed to be made or for whom it was intended, and such person could not be ascertained without extrinsic parol evidence adding to the memorandum:—

Held, not to be an agreement in writing within the statute so as to entitle the plaintiff to specific performance:—

Held, also, that an acceptance of the offer beneath the defendant's signature, signed by the plaintiff's

assignor, did not cure the defect.
White v. Tomalin, 513.

CONTRIBUTORY NEGLIGENCE.

See MUNICIPAL CORPORATIONS, 4.

CONVICTION.

Imposition of costs of commitment and conveying to jail — Offence against Public Health Act, R. S. O. ch. 205.]—A conviction for carrying on a noxious and offensive trade contrary to R. S. O. ch. 205, the Public Health Act, imposed in default of sufficient distress to satisfy the fine and costs imprisonment in the common gaol for fourteen days, unless the fine and costs, including the costs of commitment and conveying to jail were sooner paid.

Held, following *Regina v. Wright*, 14 O. R. 668, that the imposition of the costs of commitment and conveying to jail was unauthorized, and that sec. 1 of R. S. O. ch. 74, not referred to in that case, did not affect the question. *Regina v. Rowlin*, 199.

See INTOXICATING LIQUORS—JUSTICE OF THE PEACE, 2, 3—LIQUOR LICENSE ACT.

CORPORATIONS.

See COMPANY—MUNICIPAL CORPORATIONS—PROHIBITION, 1.

COSTS.

Of conveying to jail.]—See CONVICTION—JUSTICE OF THE PEACE, 3

See also LIQUOR LICENSE ACT—NEGLIGENCE—WATERS AND WATER-COURSES, 3.

COUNTY COURTS.

“All Judges” of the County Court in R. S. O. ch. 142, sec. 5, includes Junior Judge.]—See EXTRADITION, 2.

COURTS.

Chancery Divisional Court—Jurisdiction—Criminal matters—R. S. O. 1887 ch. 44, sec. 62—Consolidated Rule 218—Marginal Rule 480.]—On a motion to make absolute a rule *nisi* in a criminal matter before the Chancery Divisional Court:—

Held, per BOYD, C., that the Court had jurisdiction to entertain the matter, for the Divisional Sittings of the High Court of Justice are now the equivalent for the former sittings in full Court in term at common law, or for the purpose of rehearing in Chancery, and the criminal jurisdiction vested in the High Court not exerciseable by a single Judge is by the effect of legislation to be administered by Judges composing any of these Divisional Courts. Each Division is to follow the same practice, and therefore the Chancery Division is empowered to use the criminal practice and procedure which was formerly peculiar or limited to the Common Law Courts:—

Held, per FERGUSON, J., that the Court had not jurisdiction to entertain the matter, inasmuch as it was a Divisional Court sitting under the provisions of Cons. Rule 218; and had, therefore, only power to exercise

the jurisdiction of the High Court for the purposes referred to in R. S. O., 1887, ch. 44, sec. 62, and not the power to exercise the full jurisdiction of the High Court, such as, semble, would be possessed by a division of the Court sittings under the provisions of old marginal Rule 480. There were no rules of Court whereby it had been ordered that any criminal business should be transacted and disposed of by this Divisional Court of the High Court, for the purpose of which it would be necessary to exercise any part of the criminal jurisdiction of the High Court. *Queen v. Birchall*, 697.

COVERTURE.

Removal of disability of.]—See
LIMITATION OF ACTIONS.

CREDITOR.

See JUDGMENT CREDITOR.

CRIMINAL LAW.

1. *Pleading—Libel—Justification—Particulars—Motion to quash plea*—R. S. C. ch. 174, sec. 2, sub-sec. c): sec. 143.]—To an indictment for libel, the language of which was couched in vague general terms, the defendant pleaded that the words and statements complained of in the indictment were true in substance and in fact, and that it was for the public benefit that the matters charged in the alleged libel should be published by him:—

Held, that the plea was insufficient because it did not set out the particular facts upon which the defendant intended to rely; and that the

omission from 37 Vic. ch. 38, sec. 5, (R. S. C. ch. 163, sec. 4) of the words “in the manner required in pleading a justification in an action for defamation,” which were contained in C. S. U. C. ch. 103, sec. 9, had not the effect of altering the rule:—

Held, also, that this was a case in which the Court should in the exercise of its discretion quash the plea upon a summary motion, without requiring a demurrer, a course permitted by sec. 143 of R. S. C. ch. 174, as interpreted by sec. 2, sub-sec. (c). *Regina v. Creighton*, 339.

2. *Rape—Crown case reserved—Evidence to go to jury.*]—On a Crown case reserved it is not proper to reserve the question whether there is sufficient evidence in support of the criminal charge, that being a question for the jury: whether there is any evidence is a question of law for the Judge.

The evidence against the prisoners here was the uncorroborated evidence of the woman charged to have been raped which, in view of admissions made by her, and the circumstances, was unsatisfactory:—

Held, that the evidence was properly submitted to the jury, but the Court directed that the attention of the executive should be called to the case. *Regina v. Herman Lloyd, George Lloyd and Albert Lloyd*, 352.

3. *Separate indictments for taking unmarried girl out of control of father, and seduction—Separate offences.*]—The prisoner was convicted under R. S. C. ch. 162, sec. 44, the Act relating to “offences against the person,” for unlawfully taking an unmarried girl under the age of sixteen years out of the possession and against the will of her

father. On the same day the prisoner was again tried and convicted, under R. S. C., ch. 157, sec. 3, the Act relating to "offences against public morals," for the seduction of the said girl being previously of chaste character and between the ages of twelve and sixteen years of age.

Held, that the offences were several and distinct, and that a conviction on the first indictment did not preclude a conviction on the second one. *Regina v. Smith*, 714.

CURTESY,

Tenant by the.] — See STATUTE OF LIMITATIONS.

DAMAGES.

Agreement for sale of land—Obstruction to land by railway company—Rights of vendor and purchaser as to damages.]—The plaintiff was in possession of certain lands under an oral agreement of purchase at \$450, payable in bricks deliverable as demanded, of which \$100 worth had been demanded and delivered. The defendants, without making any compensation or taking any steps under the statute therefor, built their railway in front of the land so as to interfere with the plaintiff's right of access, whereupon this action was brought, and damages recovered by the plaintiff, he being treated as entitled to the whole estate in the land and the injury permanent, reducing the value of the land.

Held, that the company were trespassers, and could not justify the acts complained of under the statute: that substantial damages, on proof

of them, were recoverable for the disturbance of the possession; but in a first action only nominal damages for the injury to the reversion.

Held, therefore, that the damages here were not properly assessed, and a new trial was directed.

Seem, that the damages for injury to the reversion belonged to the vendor; and leave was given to add him as a party plaintiff.

The position of a vendee under a contract for sale of land considered. *Mason v. The South Norfolk R. W. Co.*, 132.

See NEW TRIAL—WATERS AND WATERCOURSES, 2—MORTGAGOR AND MORTGAGEE.

DEATH.

Of co-plaintiff between verdict and judgment.]—See NEW TRIAL.

DEED.

Registration of subsequent deed, priority of.]—See REGISTRY LAWS, 1.

DEFAMATION.

1. *Libel—Article referring to advertisement published contemporaneously—Fair criticism—Evidence—Plaintiff's case—Production of advertisement—New trial.*]—The plaintiffs brought a written advertisement to the defendant for the purpose of having it published in his newspaper, but the defendant refused to insert it, and the plaintiffs took it away intimating that it would be immediately published in another newspaper. It was so published and on the day of its publication an

article, written before its publication, appeared in the defendant's newspaper, referring to it as unfit for publication. The plaintiff sued the defendant for libel. The trial Judge told the jury that if the article was nothing more than a fair criticism of the advertisement, it was not libellous. It was objected that the defendant was not entitled to criticise the advertisement because it had not been published before the article criticizing it:—

Held, that this was not a valid objection.

The trial Judge ruled that the plaintiffs were bound to produce and put in as part of their case the written advertisement referred to by the defendant in the article complained of; and the plaintiffs, though protesting, accepted the ruling and put in the evidence:—

Held, that the ruling was wrong; but that the plaintiffs were not entitled to a new trial, the only injury to the plaintiffs being to let the defendant's counsel have the last word with the jury. *Graham et al. v. McKimm*, 475

2. *Libel*—*Letter partly libellous*—*Publication on privileged occasion*—*Malice*. The plaintiff and one S. had been in partnership, S. having retired and left the country. Subsequently the plaintiff made an assignment for the benefit of creditors. The defendant was a creditor and was appointed one of the inspectors of the estate. S. wrote a letter to one F. relative to the plaintiff's business, a portion of which the plaintiff claimed to be libellous, the remainder being admittedly privileged. F. forwarded the whole letter to the defendant who shewed it to his co-inspector, a creditor, and also to another creditor.

In an action against the defendant for the publication:—

Held, that the occasion of the publication was privileged, and that the privilege attached to the whole letter, it having been shewn only to persons equally interested with the defendant in the matter. *Howarth v. Kilgour*, 640.

DELAY.

In moving to quash by-law.]—See TAVERNS AND SHOPS.

DEPOSITIONS.

Taken in the absence of the accused.]—See EXTRADITION, 2.

DEVISE.

See WILL.

DEVOLUTION OF ESTATES ACT.

R. S. O. ch. 108, sec. 4, sub-sec. 2—*Election by will*—*Time of will taking effect.*]—An election by a widow to take her distributive share in lieu of her dower under sec. 4, sub-sec. 2 of "The Devolution of Estates Act," may be made by will, which as to such election speaks from the time of its execution, and not from the time of her death. *Re Ingolsby*, 283.

See VENDOR AND PURCHASER, 2.

DIRECTOR

Purchasing companies property.]—*See COMPANY, 2.*

DITCHES AND WATERCOURSES ACT, 1883.

See WATERS AND WATERCOURSES, 3.

DIVISION COURTS.

See GAME—PROHIBITION, 2.

DIVISIONAL COURTS.

See COURTS.

DOMICILE.

See INFANT.

DONATIO MORTIS CAUSA

Sufficiency of.]—*See* WILL.

DOWER.

Equity of redemption.]—There can be no dower in land of which the husband had merely acquired the equity of redemption, and which he had parted with.

Re Croskery, 16 O. R. 207, followed. *Gardner v. Brown*, 202.

Mortgage of goods to secure wife barring dower.]—*See* CHATTEL MORTGAGES.

EASEMENT.

See WATERS AND WATERCOURSES, 2.—WAY.

ELECTION.

By will to take under the Devolution of Estates Act.]—*See* DEVOLUTION OF ESTATES ACT.

EQUITY OF REDEMPTION.

See DOWER.

EVIDENCE.

Power to remand for further.]—*See* EXTRADITION, 2.

See also CRIMINAL LAW, 2. — DEFAMATION, 1.—EXTRADITION, 1. —HUSBAND AND WIFE, 4.—INSURANCE, 1, 5.—JUSTICE OF THE PEACE. —MORTGAGE, 2.—RAILWAYS, 2.

EXCHANGE.

Of lands.]—*See* VENDOR AND PURCHASER.

EXECUTION.

Free grants and homesteads—Exemption from execution—Interest of original locatee as mortgagee after alienation.]—The defendant was locatee of certain lands under the Free Grants and Homesteads Act, R. S. O. ch. 25, and duly obtained patents therefor. Afterwards he and his wife sold and conveyed parts of the land, he taking back mortgages to secure the purchase money:—

Held, that the mortgages were not interests in the land exempt from levy under execution within the meaning of sec. 20, sub-sec. 2.

The exemption extends to the land or any part thereof or interest therein so long as it is held by the original location title, whether before or after patent; but where there has been a valid alienation, a mortgage taken by the original locatee does not vest in him *quâ* locatee.

The word “interest” used in the

sub-section does not extend to the chattel interest of a mortgagee. *Cann v. Knott et ux.*, 422.

EXECUTORS AND ADMINISTRATORS.

Removal of executor—Trustee Act, 1850.]—An executor cannot be removed from his position, where anything remains to be done appertaining to his office, even although the will provides for his continuance as a trustee thereunder after his duties as executor have ceased, and he has acted as trustee by investing part of the trust moneys.

In re Moore, McAlpine v. Moore, 21 Ch. D. 778, distinguished. *Re Bush*, 1.

EXEMPTION.

From execution of free grant and homestead.]—See EXECUTION.

EXPULSION.

Of member from a Society.]—See BENEVOLENT SOCIETY.

EXTRADITION.

Forgery—Evidence.]—A cargo of oats was received at an elevator for the S. Co., of which the prisoner was a member, and also secretary and financial manager with power to sign notes, etc. On the day of their receipt a clerk of the S. Co., who was authorized so to do, prisoner having nothing to do with the buying and selling of the grain, signed an order for the delivery of 19,886 bushels

of the oats to a railway company, consigned to the S. Co.'s agents in New York, on whom two drafts were drawn by the S. Co., signed by the prisoner, which were accepted and paid. Warehouse receipts transferable by endorsement, were given to the S. Co. for these oats, though after the delivery thereof to the railway company, and were allowed to remain with the S. Co., without any demand being made for their cancellation. Subsequently, the prisoner, in the name of the S. Co., discounted two promissory notes at a bank, and endorsed the warehouse receipts as security for the payment thereof, the notes containing a statement that the receipts were pledged as such security with authority to sell, etc., in default of payment.

Held, in extradition proceedings, that the endorsement to the bank of the receipts did not constitute forgery. *In re Sherman*, 315.

2. *Junior Judge of County Court—R. S. C. ch. 142, sec. 5—Justices—Proof as to—State officers—Deposition taken in absence of accused—Identity of forged note—Power to remand for further evidence.*]—The expression, "all Judges, &c., of the County Court," contained in sec. 5 of the Extradition Act, R. S. C. ch. 142, includes the Junior Judge of said Court. On a charge of forgery of a promissory note, alleged to have been committed in the State of Kansas, the justice before whom the depositions were made was certified to be a justice of the peace, with power to administer oaths:—

Held, that he was a magistrate or officer of a foreign state within sec. 10 of the Act; and also that it was not necessary that he should be a federal and not a state officer; and further that the depositions need not

be taken in the presence of the accused.

The depositions failed to shew that the note, alleged to be forged, was produced and identified by the deponents or any of them :—

Held, that this constituted a valid ground for refusing extradition; and that there was no power to remand the accused to have further evidence taken before the extradition Judge as to such identification. *In re John Wesley Parker*, 612.

FACTORIES ACT.

See MASTER AND SERVANT, 2.

FORGERY.

Identity of forged note.—*See* EXTRADITION, 2.

See also EXTRADITION, 1.

FRAUDS, STATUTE OF.

See CONTRACT.

FRAUDULENT PREFERENCE.

Agreement to supply material for manufacture, the goods manufactured nevertheless to remain the property of the supplier of the material—Defeating and delaying creditors.—It appeared on the trial of an interpleader issue, that the claimant had agreed in writing with the execution debtor, an insolvent, to furnish material to the latter for the manufacture of carriages, from time to time, for one year, it being provided that no property in such goods

should pass, but that notwithstanding any improvement or work upon the same, or change of form or addition thereto or use thereof, the same and every part thereof should be and remain the goods and property of the claimant.

The material was supplied and manufactured into carriages by the execution debtor, which were seized by the defendants, execution creditors of his, and the claimant claimed the same, more being owing to him for the material supplied than the value of the goods seized :—

Held, reversing the decision of Armour, C. J., that the above agreement was not one which could be said necessarily to have the effect of defeating or delaying creditors, and in the absence of fraud the claimant was entitled to succeed on the issue :—

Held, also, reversing the decision of Armour, C. J., that the fact that the claimant, thinking that the above agreement was lost, from time to time took mortgages from the execution debtor upon the carriages manufactured by him, made no difference; for even if this had the effect of vesting the property therein in him that could only be subject to the lien of the claimant to be paid out of them. Moreover the mortgages having been taken, not to supersede the original writing, but under the error that that being lost (as supposed) would be no longer available, the rights of the parties were still subject to the original agreement. *Wellbanks v. Heney*, 549.

FREE GRANTS AND HOMESTEADS.

See EXECUTION.

GAME.

Feræ naturæ—Property of owner of land in deer found thereon—29 & 30 Vic. ch. 122—R. S. O. ch. 221, sec. 10—Construction of—Prohibition—Division Court—Undisputed facts—Error in law—Misconstruction of statutes.]—The defendant killed upon his own land, which adjoined that of the plaintiffs and was unfenced, a deer, one of the progeny of certain deer, imported by the plaintiffs and defendant, and allowed to run at large upon the land:—

Held, that the deer was *feræ naturæ* and, having been shot by the defendant upon his own land, belonged to him:—

Held, also, that neither the Act incorporating the plaintiffs, 29 & 30 Vic. ch. 122, nor R. S. O. ch. 221, sec. 10, vested the absolute property in the deer in the plaintiffs.

Prohibition was granted to a Division Court where there were no facts in dispute and the Judge in the inferior Court applied a wrong rule of law to the facts and grounded his judgment upon a misconstruction of the Acts above referred to. *Re Long Point Company v. Anderson*, 487.

GENERAL AVERAGE.

See INSURANCE, 4.

GUARANTY.

Construction of.]—*See* BANKRUPTCY AND INSOLVENCY, 2.

GUARDIAN.

Non-appointment of to infant defendant.]—*See* SEDUCTION.

HIDES.

General Inspection Act—“Anything done under this Act”—R. S. C. ch. 99, secs. 26, 96, 104—Action against inspector of hides—Pleading—General issue.]—In an action against a government inspector of leather and raw hides for fraudulently grading and branding incorrect weights and qualities on hides:—

Held, that “anything done under this Act,” in R. S. C. ch. 99, sec. 26, has the same meaning throughout the section, and means “anything intended to be done under this Act”; and the defendant not appearing to have acted *malâ fide*, or to have intended not to perform his duty under the Act, was entitled to the protection of this section, though he had not pleaded the general issue in terms, inasmuch as he had in effect stated that what he did was done under the Act.

Seem, that full effect may be given to sections 96 and 104 of R. S. C. ch. 99, by holding that up to five per cent. of any deficiency or excess in the weight of certain kinds of leather the inspector is protected against any action, and as to any excess he is entitled to any defence open to him under the Act or otherwise. *Grant v. Culbard*, 20.

HIGHWAY.

Obstruction on.]—*See* MUNICIPAL CORPORATIONS, 4.

HUSBAND AND WIFE.

1. *Animals*—Liability of wife of owner of animal *feræ naturæ* for escape from her separate property—Negligence.]—A bear belonging to

one of the defendants escaped from premises, the separate property of his wife, the other defendant, where it had been confined by him without objection from her, and attacked and injured the plaintiff on a public street:—

Held, that the wife having under R. S. O. ch. 132, secs. 3 and 14, all the rights of a *feme sole* in respect of her separate property, might have had the bear removed therefrom, and not having done so she was liable to the plaintiff for the injury complained of.

The principle of *Fletcher v. Rylands*, L. R. 1 Ex. 282, L. R. 3 H. L. 330, applied. *Shaw et al. v. McCreary et al.*, 39.

2. *Action for breach of promise of marriage — Nonsuit — Release by promisee.*]—In an action for breach of promise of marriage the plaintiff's evidence was that after promising to marry her in 1885, the defendant in March, 1886, visited her and repudiated his promise, whereupon she ordered him out of her house, and refused afterwards to renew the engagement. The trial Judge nonsuited the plaintiff on the ground that this amounted to an absolute release, and that the relationship between the parties was terminated.

Held, that the defendant having previously violated his engagement, the matter should have been left to the jury, who might have reasoned that the plaintiff chose to consider the connection at an end, and that she was not willing to subject herself to the pain and mortification of being again deceived. *Reynolds v. Jamieson*, 235.

3. *Action by wife against husband's relatives—False representations and conspiracy to bring about*

marriage—Want of precedent—Public policy.]—Action by a married woman against the father, mother, and brother of her husband for damages for false representations made to her before marriage as to the character and financial standing of her husband, and for entering into a fraudulent conspiracy to induce the plaintiff to enter into the marriage contract:—

Held, that the action being without precedent and contrary to public policy was not maintainable. *Brennen v. Brennen et al.*, 327.

4. *Advance of money from wife to husband — Presumption of gift — Onus—Corroborative evidence — R. S. O. 1887, ch. 61, sec. 10.*]—Where, in administration proceedings, the widow of the deceased claimed from the executor repayment of certain moneys paid by her, at her husband's request, out of her separate property, on premiums payable on policies on his life, which she swore were to be repaid to her; and it appeared that the moneys were paid by a third person who held them to the use of the claimant; that she acquiesced in the payment of them with great reluctance; and that she had no claim to any part of the policy moneys, which were wholly at the disposition of the deceased:—

Held, that under these circumstances the *onus* was on the executor to prove that the moneys were a gift to the deceased, and it was not necessary for the claimant to produce corroborative evidence that the moneys were to be repaid in order to recover.

In order to make out that money paid by a wife to her husband was a gift, it is necessary to prove it either by direct evidence or by such a course of dealing between the husband and

wife as shews that the money was so paid to him as a gift. *Elliott v. Bussell*, 413.

5. *Purchase by wife subject to mortgage—Separate estate—Liability of wife to indemnify grantor.*—A married woman to whom land is conveyed, subject to incumbrance, whether by way of purchase or exchange, is bound to indemnify her grantor against the payment of such incumbrance, and the property so conveyed to her is separate estate with respect to which such obligation arises.

Decision of MACMAHON, J., reversed. *McMichael v. Wilkie et al.*, 739.

See LIMITATION OF ACTIONS.

INCOME.

Assessment of at branch office.—
See ASSESSMENT AND TAXES.

INDICTMENT.

See CRIMINAL LAW, 3.

INFANT.

Domicile in Quebec—Tutors in Quebec entitled to have infant's money in Ontario paid over to them.]

Held, that the duly appointed tutors in the Province of Quebec of an infant domiciled and residing there, which Province had also been the domicile of the father at his death, were entitled to have paid over to them from the Ontario administrators of the father's estate, there being no creditors, money coming to the infant from said estate,

which had been collected in Ontario. *Hanrahan v. Hanrahan*, 396.

See COMPANY, 1—SEDUCTION—TRUSTS AND TRUSTEES, 1.

INJUNCTION.

Street Railway—Operating on Sunday—R. S. O. ch. 171—Right to restrain.—The defendants, by letters patent issued under the Street Railway Act, R. S. O. ch. 171, were authorized to build and operate (on all days except Sundays) a street railway, &c. On an information laid to restrain the operating the railway on Sunday :

Held, per GALT, C.J., that an information would not lie, for the Act did not prohibit running cars on Sunday :

Per ROSE, J., that the information would lie, for the authority to operate the railway "on all days except Sundays" implied a prohibition against working it on Sunday :

Per MACMAHON, J., that the information would not lie, for no private right or right of property was involved nor any injury of a public nature done, and the interference of the Court will not be exercised merely to enforce performance of a moral duty. *The Attorney-General, ex rel Richard Hobbs v. The Niagara Falls Wesley Park and Clifton Tramway Co.*, 624.

Without quashing by-law.—See MUNICIPAL CORPORATIONS, 2.

See also RAILWAYS, 1—WATERS AND WATERCOURSES, 2.

INNKEEPER.

Sale of stallion under R. S. O. ch. 154, for keep, &c. — Lien — Revival of — Tavern License — Owner of.]— An innkeeper, claiming to act under R. S. O., ch. 154, sold by public auction a stallion belonging to the plaintiff, a boarder at his inn, to enforce a lien thereon for the keep and accommodation thereof.

Held, that the lien existed and the sale was authorized.

After the lien accrued the plaintiff removed the stallion and subsequently brought it back to the inn.

Held, that the lien revived on the return of the stallion.

Under sec. 12 of R. S. O. ch. 194, the person receiving a tavern license is assumed to have satisfied the license commissioners that he is the true owner, but, notwithstanding, it can be shewn that the licensee was merely the agent of another who was the real owner of the business. *Huffman v. Walterhouse and Broddy*, 186.

two years after effecting the insurance the plaintiff conveyed his farm to his son, reserving to himself and wife certain benefits, but continued to work upon the farm for about a year thereafter, when he was attacked by bronchitis and asthma.

In an action to recover one-half the amount of the insurance the evidence shewed that plaintiff was totally disabled, permanently and for life, from doing manual labour, and that the diseases from which he suffered were the proximate and immediate cause of his disability. A medical witness said that he considered the plaintiff's condition attributable to a considerable extent to his advanced years, he being about seventy:—

Held, that total disability to work for a living was what was intended to be insured against, and disability from old age was not excluded, and the evidence shewed that the plaintiff came within the terms of the certificate. The arrangement made by the plaintiff with his son after the certificate was issued could have no effect upon the prior contract of insurance. *Dodds v. Canadian Mutual Aid Association*, 70.

INSPECTION ACT.

See HIDES.

INSURANCE.

1. *Life—Provision for payment in case of "total disability"—Construction of provision—Evidence.*]

The plaintiff, who was a farmer had his life insured by the defendants, and there was a clause in the policy or certificate of insurance providing that in case of "total disability" of the insured the insurers would pay him one-half of the amount of the insurance. About

2. *Fire—Interim receipt—Powers of local agent—Approval by company — Indorsements on application — Non-repudiation—Prior insurance — Eighth statutory condition—Assent of company—Election not to avoid — Extension.*]—The plaintiff had for some years insured his mill and machinery therein with the defendants, the policy having been effected through one of their local agents, there being also another insurance with another company. The plaintiff, desiring additional insurance thereon, signed an application therefor, for a portion thereof,

through the same agent, on which was an indorsement, of which he was unaware, and to which his attention was not called, that where steam was used for propelling purposes the proposal was required to be submitted to the defendants before the interim receipt was issued. The agent issued the interim receipt to the plaintiff at the time of the proposal, as was his practice, recognized by the defendants. The application, which contained a statement, without the names of the companies, of the amount of additional insurances effected elsewhere and also the amount of the prior insurance, was sent by the agent to the defendants, but was mislaid by them after they had made from it certain extensions on the policy, which had also been forwarded to them for that purpose.

About two months after the date of the interim receipt the defendants wrote their agent declining to continue the risk on the interim receipt, retaining however the portion of the premium earned, at the same time re-insuring half the risk. Of this the plaintiff was not informed, nor was any portion of the premium repaid him :—

Held, that the indorsements formed no part of the application signed by the plaintiff, and that the agent was acting in the apparent scope of his authority, and was to be deemed *primâ facie* to be the agent of the company; and as the defendants never repudiated the contract, but merely determined to put an end to it and treated it as a subsisting contract, they were liable upon it.

Under the 8th statutory condition the defendants claimed that they were not liable upon the receipt because there was prior insurance in another company, and their assent

did not appear in and was not indorsed on the policy, or that they were not liable upon their earlier insurance because of the subsequent insurance in other companies without their assent :—

Held, that the application and the interim receipt constituted the contract of insurance, and as in this contract the total amount of insurance was truly stated, and the contract continued to be binding until after the loss occurred, the defendants must be considered to have assented to such insurance, and would be compellable to make their assent appear in or to have it indorsed on their policy if such policy were issued :—

Held, also, that the prior insurance was voidable, not void, and that the defendants, after the subsequent contract was entered into in which the total amount of insurance was stated, and after they knew that it was entered into, had elected not to avoid the prior insurance, but to treat it as still subsisting by extending it.

Semble, that the defendants, having assented to the insurance stated in the contract of insurance, could not assert that the effecting such insurance had the result of avoiding the prior insurance effected by their policy. *Cockburn et al. v. The British America Assurance Company*, 245.

3. *Mutual Insurance Companies—Statute law—Retrospective operation—53 Vic. ch. 44, sec. 4 (O.)—R. S. O. 1887, ch. 167, sec. 132.* *Held*, that 53 Vict. ch. 44, sec. 4 (O), substituting a new section for R. S. O. 1887, ch. 167, sec. 132, is retrospective in its operation, and applies to premium notes given before its passing as well as to those given afterwards. *Re Saugeen Mutual Fire Insurance Company—Knechtel's Case*, 417.

4. *Marine—General average contribution—Attempt to rescue vessel and cargo—Common danger—Average bond—Adjustment—Expenditure—Liability of owners of cargo.*]

—A vessel loaded with coal stranded under stress of weather, and was abandoned as a total loss to the underwriters, the plaintiffs. The owners of the cargo, the defendants, proposed to unload at their own expense, but the plaintiffs refused to permit this and would not allow the defendants to get the cargo without signing an average bond. Upon this the defendants signed a bond which was *ex facie* imperfect, and the plaintiffs took steps to save vessel and cargo by one expedition. They failed to rescue the vessel, but saved the larger part of the cargo. They now claimed upon adjustment contribution from the defendants for the expenditure incurred, which was in excess of the value of the salvage:

Held, that the vessel and her cargo were not when stranded in a common danger, and the expenditure was not for the preservation and safety of both ship and cargo, but for the deliverance of the vessel alone; that the average bond signed did not bind the defendants to pay more than they were rightly liable to pay, and the adjustment was no obstacle to the determination of the real liability; and that the defendants were liable only to pay what they would have paid to recover the cargo by their own exertions. *Western Assurance Co. v. Ontario Coal Co.*, 462.

5. *Fire—Unoccupied building—Special condition—Reasonableness—Information given to agent of insurance company, but not in application—Powers of agent—Evidence—Rejection of.*]

—The defendants issued a policy of insurance against fire dated 23rd April, 1889, upon a house of the plaintiff.

The application signed by the plaintiff stated that the house was occupied as a residence by the plaintiff's son. A fire took place on the 14th November, 1889, at which date and for six months previously the house had been unoccupied. One of the special conditions indorsed upon the policy was that if a building became vacant or unoccupied and so remained for ten days, the entire policy should be void. The plaintiff and his wife swore that when the agent came to him and drew the application he asked the plaintiff if there was anyone in the house at the time, and the plaintiff told him that his son was living there at the time, but was going to leave in about two weeks, and asked if that would make any difference, and was informed by the agent that it would not. By a clause in the application the plaintiff agreed that no statement made or information given by him prior to issuing the policy to any agent of the defendants should be deemed to be made to or binding upon the defendants unless reduced to writing and incorporated in the application; and on the margin of the application there was a notice shewing that the powers of agents were limited to receiving proposals, collecting premiums, and giving the consent of the defendants to assignments of policies:—

Held, that the special condition referred to was not an unreasonable one, and that the agent had no power to vary it; and an action to recover the amount of the loss was dismissed.

The plaintiff at the trial sought to give evidence of certain transactions between the agent of the defendants

and a brother of the plaintiff, for the purpose of shewing that the plaintiff, having become aware of them before the application made by him, was justified in believing that the defendants did not regard the condition as to occupation as a material one:—

Held, that this evidence was properly rejected. *Peck v. Agricultural Ins. Co.*, 494.

INSURANCE MONEYS

Application of.—See MORTGAGOR AND MORTGAGEE.

INTEREST.

From what time to be allowed on sale of land.—See SALE OF LAND, 1.

See also TRUSTS AND TRUSTEES, 1.
—MORTGAGOR AND MORTGAGEE.

INTOXICATING LIQUORS.

Liquor License Act, R. S. O. ch. 194, sec. 70—*Selling liquor without license—Conviction—Imprisonment forthwith on non-payment of fine.*—The defendant, being present in Court on a charge which was disposed of, was, without any summons having been issued, charged with another offence, namely, of selling liquor without a license. The information was read over to him, to which he pleaded not guilty, and evidence for the prosecution having been given, he thereupon asked for and obtained an enlargement till the next day, when, on his not appearing, he was convicted in his absence, and fined \$50 and costs, and in default of payment forthwith, without any distress having been directed, imprisonment was awarded:

Held, that under the circumstances the issuing of a summons was waived.

Held, also, that the conviction in awarding imprisonment in default of payment, was properly drawn, for by sec. 70 of R. S. O. ch. 194, under which the conviction was made, there is no power to direct distress. *Regina v. Clarke*, 601.

JUDGMENT CREDITOR.

Right to garnish earnings of Railway Company.—See RAILWAYS, 5.

JURISDICTION.

To grant a new trial between verdict and judgment after death of plaintiff.—See NEW TRIAL.

JUSTICE OF THE PEACE.

1. *Procedure before — Proof of municipal by-law*—R. S. O. ch. 184, sec. 289.]—On the trial of a charge of being a transient trader without a license contrary to a municipal by-law, no copy thereof certified by the clerk to be a true copy, and under the corporate seal, as required by sec. 289 of R. S. O. ch. 184, was given in evidence. A by-law stated by the solicitor for the complainant to be the original by-law, was, however, read to the defendant in Court:—

Held, that the requirements of section 289 not having been complied with, the conviction was invalid, and must be quashed. *Regina v. Dowslay*, 622.

2. *Absence of police magistrate—Trial of offence under R.S.C. ch. 157—Alternative punishment—Imprisonment*

*sonment for more than 3 months—R. S. C. ch. 178.]—*By sub-sec. 2, of sec. 8 of the R. S. C. ch. 157, any loose, idle, or disorderly person, or vagrant, shall upon summary conviction before two justices of the peace be deemed guilty of a misdemeanour, and liable to a fine not exceeding \$50, or to imprisonment not exceeding six months, or to both. By sec. 62 of R. S. C. ch. 178 the justices are authorized to issue a distress warrant for enforcing payment of a fine; and, if issued, to detain the defendant in custody, under sec. 62, until its return; and, if the return is "not sufficient distress," then to imprison for three months. Two justices of the peace for the City of Toronto, in the absence of the police magistrate for the said city, convicted the defendant for an offence under said Act, and imposed a fine \$50, and, in default of payment forthwith, directed imprisonment for six months unless the fine were sooner paid:—

Held, that under the said sub-sec. the justices had jurisdiction to adjudicate in the matter; and that it was not necessary to consider the effect of an agreement entered into between the police magistrate and one of the justices to assist him in the trial of offences:—

Held, also that the conviction was bad, for under R. S. C. ch. 157 there was no power to award imprisonment as an alternative remedy for non-payment of the fine; while under R. S. C. ch. 178, imprisonment could only be awarded after a distress has been directed and default therein; and furthermore the imprisonment in such case could only be for three months. *Regina v. Lynch*, 664.

3. *Summary conviction—"Liquor License Act" R. S. O. ch. 194—Offence against sec. 49—Arrest in*

lieu of summons—Remand by one justice only—Powers of justices under sec. 70—Distress warrant—Imprisonment upon non-payment of fine and costs—Admission of no distress—Costs of conveying to gaol—Power to amend conviction—Evidence—Saving clause, sec. 105.]—

The defendant was convicted before two justices of the peace of selling liquor without a license, contrary to sec. 49 of the "Liquor License Act," R. S. O. ch. 194. A conviction was drawn up and filed with the clerk of the peace in which it was adjudged that the defendant should pay a fine and costs, and if they were not paid forthwith, then, inasmuch as it had been made to appear on the admission of the defendant that he had no goods whereon to levy the sums imposed by distress, that he should be imprisoned for three months unless these sums and the costs and charges of conveying him to gaol should be sooner paid. An amended conviction was afterwards drawn up and filed, from which the parts relating to distress and the costs of conveying to gaol were omitted. A warrant of commitment directed the gaoler to receive the defendant and imprison him for three months unless the said several sums and the costs of conveying him to gaol should be sooner paid.

Upon a motion to quash the convictions and warrant:—

Held, that the mode adopted for bringing the defendant before the justices was not a ground for quashing the conviction; and *semble*, also, that it was not improper to arrest him instead of merely summoning him:—

Held, also, that the fact that the defendant was remanded by only one justice could not affect the conviction.

Semble, that the justices had no power under R. S. O. ch. 194, sec. 70, to issue a distress warrant or to make the imprisonment imposed dependent upon the payment of the fine and costs; but as this objection was not taken by the defendant, no effect was given to it:—

Held, also, that the justices had the right to draw up and return an amended conviction in a proper case:—

Held, also, that if the justices were bound to issue a distress warrant, the insertion of the words relating to the admission of the defendant that he had no goods, was proper; and if they had no power to issue a distress warrant, these words were mere surplusage and did not vitiate the conviction:—

Held, also, that if the justices had no power to require the costs of conveying him to gaol to be paid by the defendant, the conviction was amendable, as and when it was amended; for the amendment was not of the adjudication of punishment:—

Held, lastly, that having regard to sec. 105 of R. S. O. ch. 194, and to the evidence before the justices, the convictions and warrant should not be quashed. *Regina v. Menary*, 691.

See PROHIBITION, 1.

LANDLORD AND TENANT.

Encroachment by tenant on adjoining land—Title by possession—Action of trespass—Intruder on Crown lands.]—A lessee of a lot had for more than twenty years exercised acts of ownership over part of a lot adjoining, and now claimed to have acquired title from his landlord by possession to the said part, and brought

this action of trespass against the present owner of the rest of the said adjoining lot:—

Held, that his action must be dismissed, for although a tenant taking in land adjacent to his own by encroachment, must, as between himself and his landlord, be deemed *prima facie* to take it as part of the demised land, yet that presumption will not prevail for the landlord's benefit against third persons.

The result of the cases appears to be that where a person is in possession with the assent of the Crown, paying rent; or where a person is a purchaser, although the patent has not issued, such person can maintain trespass against a wrong-doer, but this was not the present plaintiff's possession.

Harper v. Charlesworth, 4 B. & C. 574, referred to and specially considered. *Brueya v. Rose*, 433.

LACHES.

See COMPANY, 1.

LEASE.

Reasonable terms of building lease.]—*See* TRUSTS AND TRUSTEES, 2.

LIBEL.

See DEFAMATION.

LICENSE COMMISSIONERS.

See MANDAMUS.

LIEN.

Mechanics' lien—Prior mortgage—Subsequent lien—Increase of selling value of land—Priority.]—Where there is a registered prior mortgage affecting land and buildings, and a mechanic's lien for subsequent work thereon, the mortgage retains its priority to the extent of the value of the security before the work began, in respect of which the lien attaches, and the lien has priority only to the extent of the additional value given by the subsequent improvements.

And where the owner of a mill subject to a mortgage, intending to have certain improvements effected, which although as regards the work of a lien holder were fully carried out, were otherwise only partly complete and left the mill in an unfinished state:—

Held, that the lien holder was not entitled to priority for the work done, it not clearly appearing that the selling value of the property had been increased thereby.

Where, in a consent judgment in the usual form in lien cases, a reference was made to a local registrar of the Court:—

Held, that an appeal lay from his report, it appearing from the whole judgment that the reference was to him as Master. *Kennedy et al. v. Haddow et al.*, 240.

Revival of.]—See **INNKEEPER.**

Priority of.]—See **REGISTRY LAWS, 3.**

See also **RAILWAYS, 1.**

LIMITATION OF ACTIONS.

Husband and wife—Removal of disability of coverture—R. S. O., ch

111, secs. 4, 43—Title by possession—Right of entry—Mortgagor barred, mortgagee not.]—A husband and wife were married in 1841. In 1865 the wife acquired three adjoining lots of land by conveyance from a stranger. The defendant was put in possession of the lands in 1869 by the husband, and in 1870 one of the lots was conveyed by them to him. In 1881 the husband and wife mortgaged the unconveyed lots which were afterwards purchased by the plaintiff at a sale under the power of sale in the mortgage. The defendant remained in possession of all the lots until 1888. In an action of trespass:—

Held, (in this affirming the judgment of *Rose, J.*), that the wife's disability of coverture having been removed in 1876 by 38 Vict. ch. 16 secs. 1 and 5 (*R. S. O. ch. 111, secs. 4 and 43*), the Statute of Limitations ran against her from that time, and that the defendant had acquired a good title by possession against her:—

Held, however, that a new right of entry accrued to the mortgagee, and that the statute did not commence to run against him until (as the earliest possible period) the time of the execution of the mortgage, less than ten years before action, and that the plaintiff claiming under him was entitled to succeed.

Seemle, per FERGUSON, J. The plaintiff, as purchaser under the power of sale, acquired a "new title" at the time of such sale, at which time the Statute began to run against him.

The effect of the "Married Woman's Property Act, 1859," as to property not excepted thereby, is that all interference on the part of the husband during their joint lives is ended. *Cameron v. Walker*, 212.

LIMITATIONS, STATUTE OF.

Lands — Heirs-at-law — Tenant by curtesy of equitable estate—Redemption judgment — Mortgage — Power of sale.]—In an action for redemption and possession against a mortgagee by the tenant by the curtesy and the heirs of a deceased mortgagor who were infants when possession was taken by the mortgagee, it appeared that the right of the tenant by the curtesy had been barred by the statute as against the mortgagee but that of the heirs had not:—

Held, that the heirs were entitled to redeem subject to the right of the mortgagee and those claiming under him to hold possession during the life of the tenant by the curtesy whose estate had by virtue of the statute become vested in the mortgagee.

Proper judgment where in such circumstances the heirs-at-law take proceedings for redemption of the lands during the life of the tenant by the curtesy: *Anderson et al. v. Hanna et al.*, 58.

See **LIMITATION OF ACTIONS.**

LIQUOR LICENSE ACT.

R. S. O. ch. 194—Adjudication—Conviction — Imprisonment without prior distress—Costs of conveying to jail.]—The adjudication on a second offence under the “Liquor License Act,” without providing for distress, directed immediate imprisonment in default of the payment of the fine and costs; and the conviction drawn up under it was in similar terms. After the issue of a writ of *certiorari*, but before its return, an amended conviction was returned providing for distress being first made:—

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Held, that the adjudication and conviction made under it were void for not providing for distress; and that the amended conviction could not be supported, because it did not follow the adjudication.

Semble, that had the amended conviction been in other respects good it would not have been void under the Liquor License Act for including the costs of conveying to jail. *Regina v. Cantillon*, 197.

See **INTOXICATING LIQUORS—JUSTICE OF THE PEACE, 3.**

MANDAMUS.

Taverns and shops — License Commissioners — Notice of action — R. S. O. ch. 194.]—A mandamus will not be granted to compel a board of license commissioners to issue a license to a person to whom one has been granted, but not issued by the retiring commissioners, where they have not completed their functions, their acts having been reversed by their successors in office.

A notice of action is necessary in an action for damages against a board of license commissioners acting under R. S. O. ch. 194. *Leeson v. The Board of License Commissioners of the County of Dufferin et al.*, 67.

See **MUNICIPAL CORPORATIONS, 1.**

MASTER AND SERVANT.

1. *Injury to workman by unguarded saw — Action for negligence — “Moving,” meaning of in sec. 15 of Factories Act, R. S. O. ch. 208 — “Defect,” meaning of in sec. 3 of Workmen’s Compensation for Injuries Act, R. S. O. ch. 141.*]—By

sec. 15 of the Factories Act, R. S. O. ch. 208, it is provided that all belting, shafting, gearing, fly-wheels, drums, and other moving parts of the machinery shall be guarded:—

Held, that the word “moving” is used in its transitive sense, and signifies “propelling,” and that no duty is imposed by the section upon owners of saw mills to guard the saws which are propelled by the moving parts of the machinery.

By sec. 3 of the Workmen’s Compensation for Injuries Act, R. S. O. ch. 141, where personal injury is caused to a workman by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the employer, the workman shall have the same right of compensation and remedies against the employer as if he had not been engaged in his work:—

Held, that the want of a guard to a saw was not a defect within the meaning of this provision.

Such a defect must be an inherent defect, a deficiency in something essential to the proper user of the machine.

And where a workman in a saw mill was injured by being thrown against an unguarded saw, and it was shewn that a guard would have prevented the injury:—

Held, that an action for negligence was not maintainable against the owners at common law, nor by virtue of either of the above mentioned statutes. *Hamilton v. Groesbeck et al.*, 76.

2. *Accident to servant — Fall of elevator — Negligence — Master’s knowledge of defects — Want of reasonable care — Common law liability — “Workmen’s Compensation for Injuries Act” — Factories*

Act, R. S. O. ch. 208, sec. 15, sub-sec. 4.—In an action by a workman against his employers to recover damages for injuries sustained owing to the falling of the cage of an elevator in the defendants’ factory, the negligence charged was in the manner in which the heads of the bolts were held, and in the nature of the safety catch used upon the cage.

There was no evidence to shew that the defendants were or should have been aware that the bolts were improperly sustained. They had employed a competent contractor to do this work for them only a few weeks before, and it was not shewn that the alleged defect might readily have been discovered.

Held, that the defendants were not liable upon this head:—

Murphy v. Phillips, 35 L. T. N. S. 477, distinguished.

The safety catch was made for the defendants by competent persons, and there was no evidence that it was not one which was ordinarily used:—

Held, that the defendants were not liable upon this head unless there was a want of reasonable care on their part in using the appliance which they used; and it was no evidence of such want of reasonable care merely to shew that a safety catch of a different pattern was in use ten years previously by others, or even that it was at present in use, and that a witness thought it might have prevented the accident; and as no negligence was shewn, the defendants were not liable either at common law or under the Workmen’s Compensation for Injuries Act.

By sec. 15, sub-sec. 4, of the Factories Act, R. S. O. ch. 208, “All elevator cabs or cars, whether

used for freight or passengers, shall be provided with some suitable mechanical device, to be approved by the inspector, whereby the cab or car will be securely held in the event of accident," &c.

There was no evidence to shew whether this particular safety catch had been approved by the inspector:—

Held, that the onus was upon the plaintiff to prove that the catch had not been approved; and if it had neither been approved nor disapproved, the question still was whether the catch used were of such a character and pattern as to make the use of it unreasonable. *Black v Ontario Wheel Company*, 578.

3. "*Workmen's Compensation for Injuries Act*"—*Defect in machinery*—*Negligence*—*Contributory negligence*.]—The lower blade of a pair of steam shears was attached by a bolt to an iron block, called the bed plate, some eight inches thick, upon which the iron to be cut was put, and along the face thereof, where the workman stood, was a guard, three inches high, under which the iron was placed and pushed forward to the shears, the only danger being when the iron became too short to allow the guard to be any protection. The bolt was too long, projecting outwards about four and a half inches, which it was urged was a defect in the machine, making it dangerous, and the cause of the accident to the plaintiff, but the evidence failed to shew it was insufficient for the purpose for which it was used, or likely to cause injury by reason of its length. The plaintiff, who had previously seen others working at the machine, was put to work at it himself, and had worked several times at it prior to the acci-

dent without injury or fear of any, the accident being caused by the piece of iron he was holding becoming too short to hold outside of the guard, and in attempting to hold it down with another piece his fingers got jammed and crushed. Evidence was given that the accident could have been avoided by the use of tongs. No instructions were given plaintiff except a warning not to let his fingers get too close to the shears:—

Held, that defendants were not liable for the accident, there being no evidence that the bolt was insufficient for the purpose for which it was used to bolt the under side of the shears to the bed-plate, or that from its length it was likely to injure a person working at the machine.

Quere, whether there was evidence of contributory negligence on the plaintiff's part. *Bridges v. The Ontario Rolling Mills Company*, 731.

MINERALS.

Mineral gas.]—See MUNICIPAL CORPORATIONS, 3.

MORTGAGE.

1. *Power of sale without notice*—*Action to recover land without leave required by sec. 30, R. S. O. ch. 102.*]—A power of sale in a mortgage authorized a sale without any notice. Default having been made in the payment of the mortgage moneys, notice of sale was given exercisable forthwith. Shortly afterwards an action was brought by the mortgagees for the possession of the mortgaged premises without the leave of

a Judge, as required by sec. 30, of R. S. O. ch. 102, having been first obtained.

Held, that the Act did not apply, there being no proviso for notice in the mortgage. *Canada Permanent Building Society v. Teeter et al.* 156.

2. *Security for present and future advances—Payment—Land held in suretyship—Giving time by renewals—Release of land—Parties—Creditors' rights—Evidence.*—One of the defendants, who was the husband of another of the defendants, mortgaged certain lands to the plaintiff, a member of a mercantile firm, to secure an existing indebtedness to the firm and future advances. Subsequently the husband, by the advice of the plaintiff, conveyed his equity of redemption in the lands to his wife, subject to the mortgage. At the time of this conveyance, the debt due the plaintiff's firm was represented by notes under discount which, as they fell due, were retired by the firm, the husband making part payments thereon, procuring fresh goods from the firm, giving renewals for the balances and getting delivery up of the original notes, the wife not being consulted as to these dealings, and rights against her not being reserved. The husband subsequently made an assignment under R. S. O. ch. 124.

In an action for that purpose the conveyance to the wife was declared fraudulent and void as against creditors, but not as against the creditors' assignee, it having been made before the Assignment and Preferences Act: *Ferguson v. Kenney*, 16 A. R. 272.

In the present action on the plaintiff's mortgage, it was held by the Court of Appeal that the plaintiff was estopped from disputing the

validity of the conveyance to the wife, and that the mortgaged lands were not chargeable with advances made after notice of such conveyance, and the action was referred back to an Official Referee (16 A. R. 522).

On a second appeal from the Referee's report:—

Held, that the course of dealing of plaintiff's firm did not operate as a payment of the original notes or debt: *Dominion Bank v. Oliver*, 17 O. R. 432, followed. But

Held, that the wife, at the time of the conveyance to her, became a surety in respect of the lands, and that the renewal of the notes by the plaintiff's firm discharged the lands from liability.

Held, also, following the judgment in *Blackley v. Kenney*, *supra*, that the mortgage was not a security for advances made after the conveyance to the wife, nor could the plaintiff's firm claim as simple contract creditors against the lands, nor could the creditors' assignee, who was a defendant in this action, claim on behalf of the other creditors, whether execution creditors or otherwise, they not being parties to this action.

A certified copy of the certificate of the Court of Appeal of the result of an appeal in an action is not evidence of the judgment therein in another action between different parties. *Blackley v. Kenney et al.*, 169.

3. *Right to consolidate.*—The plaintiffs who were the mortgagees under three mortgages from the same mortgagors on different lands, were held entitled only to consolidate in respect of the mortgages in default when action brought to enforce them, and as the amount due on one of the mortgages had been

then paid, and there was then no default as to it, the right to consolidate it was refused. *The Scottish American Investment Co. v. Tennant*, 263.

To creditor.]—See BANKRUPTCY AND INSOLVENCY, 1, 3.

Liability of purchaser of lands subject to a mortgage to pay off.]—See VENDOR AND PURCHASER, 1.

Taking account and rectification of.]—See MORTGAGOR AND MORTGAGEE.

Wife purchasing subject to.]—See HUSBAND AND WIFE, 5.

See, also, STATUTE OF LIMITATIONS.

MORTGAGOR AND MORTGAGEE.

Application of insurance moneys—Acceleration clause in mortgage—Election not to claim whole principal—R. S. O. ch. 102, sec. 4, sub-sec. 2—Interest, time of commencement—Mortgage account—Rectification of mortgage—Laches—Agreement—Local agent and appraiser, powers of—Wrongful sale under power in mortgage—Illegal distress—Measure of damages.]—Upon a motion for an interim injunction the defendants filed an affidavit and statement shewing that they had applied insurance moneys received by them, in respect of loss by fire of buildings upon land mortgaged to them by the plaintiffs, upon overdue instalments of principal, and an insurance premium paid by them; and in their statement of defence they also stated their position in a way inconsistent with that which they afterwards took, viz., that the insurance money was ap-

plicable upon the whole principal, which, by virtue of an acceleration clause in the mortgage, had become due:—

Held, that the defendants had made their election, so far as the effect of the default and the application of the insurance money was concerned, not to claim the whole principal as having become due by reason of the default; and that they must apply the insurance money, as required by R. S. O. ch. 102, sec. 4, sub-sec. 2, upon arrears of principal and interest.

Corham v. Kingston, 17 O. R. 432, approved and followed.

Interest can be claimed by mortgagees only from the time the money is actually paid out by them.

Method of taking a mortgage account shewn.

Rectification of the mortgage deed as to the time of the first payment of principal was refused where it was sought by the mortgagors at a time when the payment in any event was long passed due, and the mortgagees, without fraud, had acted upon the mortgage as executed, and without notice of the intention of the mortgagors to have the payment fixed for a later period; and where also there was really no agreement upon which to found the rectification, the defendants' local appraiser and agent to receive applications having no express or implied authority to make such agreements.

For wrongful proceedings under power of sale in a mortgage, illegal distress upon chattels, and consequent wrongs:—

Held, that the plaintiffs were entitled to recover more than their mere money loss. *Edmonds et al. v. Hamilton Provident and Loan Society*, 677.

See LIMITATION OF ACTIONS.

MUNICIPAL CORPORATIONS.

1. *Public Health Act, R. S. O. ch. 205, sec. 49—Payment for services of physician—Judgment against local board of health as a corporation—Order upon treasurer of municipality—Mandamus.*—Section 49 of the Public Health Act, R. S. O. ch. 205, provides that "The treasurer of the municipality shall forthwith upon demand pay out of any moneys of the municipality in his hands the amount of any order given by the members of the local board, or any two of them, for services performed under their direction by virtue of this Act."

A physician recovered judgment in a Division Court against a township local board of health, sued as a corporation, for services performed in a small-pox epidemic.

It appeared that the physician had been appointed medical health officer of the municipality by the council, but that before suing the board he had brought an action against the municipal corporation for his services, in which he failed.

Upon motion by the physician for a mandamus under sec. 49 to compel the members of the board to sign an order upon the treasurer of the municipality for the amount of the judgment recovered:—

Held, that, although it might be difficult to conclude that a board of health is constituted a corporation by the Act, yet the judgment of the Division Court practically decided that this board might be sued as such, and, not being in any way impeached, it could not be treated as a nullity. As there appeared to be no other remedy, the applicant was entitled to the mandamus. *Re Derby and the Local Board of Health of South Plantagenet*, 51.

2. *By-law authorizing taking of gravel without specifying lands—Illegality—R. S. O. ch. 184, sec. 550, sub-sec. 8; sec. 338—Injunction without quashing by-law.*—By sec. 550, sub-sec. 8, of R. S. O. ch 184, the council of every township is authorized to pass by-laws for searching for and taking such timber, gravel, stone, or other material or materials as may be necessary for keeping in repair any road or highway within the municipality:—

Held, that the meaning of this section is that the council may, as necessity arises for their doing so, exercise the right to take gravel, &c., from any particular parcel or parcels of land, having first declared the necessity to exist and chosen and described the land from which the material is to be taken, by a by-law; and therefore a by-law, purporting to be passed under this section, which authorized and empowered the pathmasters and other employees of the corporation to enter upon any land within the municipality when necessary to do so, save and except orchards, gardens, and pleasure-grounds, and search for and take any timber, gravel, &c., was upon its face illegal, because it purported to confer upon its officers wider and more extensive powers than the statute authorized:—

Held, also, notwithstanding the the provisions of sec. 338 of R. S. O. ch. 184, that the plaintiff was entitled without quashing the by-law to an injunction to restrain the defendants from proceeding to enforce the rights they claimed under this by-law, by entering upon his lands. *Rose v. Township of West Wawanosh et al.*, 294.

3. *Mineral gas—R. S. O. ch. 184, sec. 565—Form of by-law—Indem-*

nity—*Right to reservoir.*.]—Mineral gas is a “mineral” within the meaning of sec. 565 of the Municipal Act, R. S. O. ch. 184.

A lease under that section should be of the right to take the minerals, and not of the highway itself. The lease in this case was of a portion of the highway, “for the purpose of boring for and taking therefrom oil, gas, or other minerals:” the quantity of land was no more than was necessary for the company’s purposes, and the rights of the public were fully protected:

Held, that the practical difference here was so small as not to constitute a ground for quashing the by-law.

The council before passing the by-law, insisted on an indemnity from the gas company against any costs and damages that might be incurred by reason of the passing of same:

Held, that under the circumstances, this could not be deemed to be evidence that it was not passed in the public interest.

The plaintiffs, by first sinking a well on the land near the defendants, did not thereby acquire the right to restrain the defendants from using the reservoir lying under the said land. *The Ontario Natural Gas Co. v. Smart et al.* and *In re The Ontario Natural Gas Co. and the Corporation of the Township of Gosfield South*, 391.

4. *Obstruction on highway—Digging well under R. S. O. ch. 184, sec. 489, sub-sec. 42—Negligence—Contributory negligence.*.]—The defendants, for the purpose of sinking a well in one of the public streets of the village, to procure water for public purposes, under the power conferred by sec. 489 of the Municipal Act, had erected a derrick in

the said street without placing a hoarding around it. The plaintiff had driven into the village past the derrick without its appearing to affect the horse, the derrick not then being at work, but on attempting to pass it on her way home, while the derrick was at work and making an unusual noise, the horse took fright and ran away, the plaintiff being thrown out of the carriage and severely injured. The jury found that the derrick was of a nature to frighten horses, and that the defendants had not taken proper precautions to guard against accidents, and that there was no contributory negligence on the plaintiff’s part:—

Held, that the defendants were liable for the injury sustained by the plaintiff. *Lawson v. Alliston*, 655.

5. *House being moved coming in contact with telephone wire across street, loosening bricks and injuring passer by—Liability.*.]—O. was moving a house twenty-five feet high along one of the streets in a city, having obtained the authority of the city engineer to do so, when by reason of its coming in contact with a wire, of the existence of which O. was fully aware, stretched by a telephone company, without any authority from the city, across the street, the wire being nineteen and a half feet from the ground, though the company’s Act of incorporation required it to be at least twenty-two feet, the wire was torn from its fastenings, loosening some bricks, which fell on the plaintiff severely injuring him:—

Held, that no liability attached either to the city or the telephone company, and that O. alone was liable for the damage sustained by the plaintiff.

Decision of STREET, J., at the trial, varied. *Howard v. The Corporation of St. Thomas et al.*, 719.

NEGLIGENCE.

Mistake in compounding medicine — Physician—Druggist—Costs.]

A physician wrote a prescription for the plaintiff and directed that it should be charged to him by the druggist who compounded it, which was done. His fee, including the charge for making up the prescription, was paid by the plaintiff. The druggist's clerk by mistake put prussic acid in the mixture, and the plaintiff in consequence suffered injury.

Held, that the druggist was liable to the plaintiff for negligence, but the physician was not.

Under the circumstances of the case no costs were awarded to or against any of the parties. *Streeton v. Holmes et al.*, 286.

Evidence of.]

See, also, MASTER AND SERVANT, 2.—MUNICIPAL CORPORATIONS, 4.

NEW TRIAL.

Action for negligence — Death between verdict and judgment — Damages — Jurisdiction — Railways and railway companies — Level crossing—Liability.]

Where in an action for damages against a railway company, one of the parties to whom damages were awarded, who was an infant, died after verdict and before judgment, and the verdict was now moved against, on the ground of excessive damages:—

Held, that the Court to prevent injustice, had power to grant a new trial, which was ordered unless the damages given to the deceased child were reduced to a sum commensurate with the expense caused to the mother's estate by its illness and

maintenance. *Sibbald v. Grand Trunk R. W. Co. et al.*—*Tremayne v. Grand Trunk R. W. Co. et al.* 164.

See DEFAMATION—PROHIBITION, 2.

NOTICE

Of action.]

Of dissolution.]

Of insolvency.]

Of trust in transfer of shares.]

See also MASTER AND SERVANT, 3 —REGISTRY LAWS, 3.

PARTNERSHIP.

1. *Agreement for participation in profits—Construction of—Relationship of parties—Joint business — Debtor and creditor.*]

The plaintiffs sued G. and W. for the price of goods sold to the firm of P. W. G. & Co., and the principal question in the action was whether W. was an actual partner in the firm; the evidence failing to shew that he was an ostensible partner and as such liable to third persons:—

Held, that the true test to be applied to ascertain whether a partnership existed was to determine whether there was a joint business, or whether the parties were carrying on business as principals and agents for each other.

G. and W. did not intend to create a partnership between them. G. was carrying on business in the name of P. W. G. & Co., as a dealer

in pianos and organs, and, being in want of money, applied to W. for a loan; he did not ask W. to become his partner, nor did W. suggest it, but G. proposed to give W. half the profits of his business if W. would lend him \$500.

The money was advanced and the following receipt was given by G. :-

"TORONTO, 13th February, 1888.

Received from W. the sum of \$500 to be used for carrying on the business of dealers in pianos and organs, in return for which I hereby agree to give the said W. one-half of the profits of the said business, after all expenses have been paid, including the sum of \$10 a week, which is to be charged as wages to G., this arrangement to continue until the 1st day of January, 1889, and to be continued thereafter if desired by Mr. W. The said W. reserving a claim upon instruments in the store to the value of \$500, and he can also at any time demand the said sum upon giving one month's notice, in which case this agreement would be at an end."

W. made a subsequent advance of \$500 to G., and on the 14th of April, 1888, a receipt was given for such advance containing an agreement to pay "over and above the agreement of the 13th of February, interest at the rate of eight per cent. per annum."

This receipt was at the request of W. signed "P. W. G. & Co., p. P. W. G. sole partner of said firm":-

Held, that these documents did not establish that the business was the joint business of G. and W. or that they were carrying it on as principals or agents for each other; but that they did establish that the true relation was that of debtor and creditor; and W. was therefore not liable to the plaintiffs. *Mendelsshon*

Piano Company v. Graham and West, 83.

2. *Dissolution—Want of public notice—Credit given to firm after dissolution—No previous dealings with firm—Liability of retiring partner.*]—The plaintiffs received from their traveller an order for goods from the firm of C. Bros., hotel-keepers. Before they delivered the goods they became aware by means of a mercantile agency that a partnership had existed under the name of C. Bros., and that S. L. C. was one of the members of it, and they were at the same time informed that the partnership still existed. They shipped and charged the goods, and also goods subsequently ordered, to C. Bros. As a matter of fact, however, the partnership did not exist at the time the first order was given, S. L. C. having retired from the business, and the plaintiffs had had no dealings with the firm while it was in existence. No public notice was given of the dissolution; S. L. C. continued to live at the hotel except when he was absent on his own business: the lamp with the name of C. Bros. continued at the door; the liquor license in the name of C. Bros. continued to hang in the bar-room; and letter-paper with the heading "C. Bros., proprietors" continued to be handed to customers.

Held, that where a known member of a firm retires from it, and credit is afterwards given to the firm by a person who has had no previous dealings with it, but has become aware as one of the public that it existed, and has not become aware of his retirement, the retiring member of the firm is liable unless he shews that he has given reasonable public notice of his re-

tirement; and, as such notice was not given here, S. L. C. was liable, not only for the goods first, but for those subsequently, ordered, no notice of the retirement having ever been given. *C. P. Reid & Co. v. Coleman Brothers*, 93.

3. *Change of firm—Novation—Privity.*]—A certain firm was indebted to the plaintiffs. Another firm, bearing the same name, but composed of different individuals, assumed its liabilities, as between itself and the former firm and continued the business and made certain payments to the plaintiffs, and also asked for time to pay the balance. There was no evidence of any assets of the first firm being taken over by the second :—

Held, that the above was not sufficient to create a new obligation as between the plaintiffs and the new firm.

Henderson v. Killey, 14 O. R. 149, and in appeal before the Supreme Court, unreported, cited and relied on. *The Canadian Bank of Commerce v. George Marks et al.*, 450.

4. *Dissolution—Pending contract.*]—The defendants contracted to deliver lumber to a firm of three partners. Before delivery the firm was dissolved, and the defendants refused to carry out their contract.

In an action brought in the individual names of the three partners, for damages for non-delivery :—

Held, that the dissolution of the firm was no justification in law for the defendant's refusal to carry out their contract. *McCraney et al. v. McCool et al.*, 470.

PAYMENT.

When cash payment to be made on sale of land.]—See SALE OF LAND, 1.

PLEADING.

Motion to quash plea to indictment.]—See CRIMINAL LAW, 1.

See also HIDES.

PLEDGE.

Of shares of stock for a loan.]—See SHARES.

POSSESSION.

Time to take possession on sale of land.]—See SALE OF LAND, 1.

Title by.]—See LANDLORD AND TENANT.

Unity of.]—See WATERS AND WATERCOURSES, 2.

POWER OF SALE.

See STATUTE OF LIMITATIONS.

PRACTICE.

As to appeal from report of local registrar.]—See LIEN.

PRECEDENT.

Want of for action.]—See HUSBAND AND WIFE, 3.

PREFERENCE.

See FRAUDULENT PREFERENCE.

PRESCRIPTION.

Rights by.]—See WATERS AND WATERCOURSES, 2.

PRINCIPAL AND AGENT.*See* AGENT.**PRIORITY.**

Of registered judgment for alimony over assignment for the benefit of creditors.—*See* ALIMONY.

Of mortgage over mechanics lien which does not increase the selling value of the land.—*See* LIEN.

PRIVILEGED COMMUNICATION*See* DEFAMATION.**PROHIBITION.**

1. *Justices of the Peace*—*R. S. C. ch. 174, secs. 80, 140*—*Corporation*—"Person" in *R. S. C. ch. 1, sec. 7, sub-sec. 22.*—A writ of prohibition may be issued to a justice of the peace to prohibit him from exercising a jurisdiction which he does not possess.

The word "person" in *R. S. C. ch. 1, sec. 7, sub-sec. 22*, includes any corporation "to whom the context can apply according to the law of that part of Canada to which such context extends," but as justices of the peace have not now and never had jurisdiction by the criminal procedure to hear charges of a criminal nature preferred against corporations: such word does not include corporations in cases where a justice of the peace is attempting to exercise such a jurisdiction.

A justice of the peace cannot compel a corporation to appear before him, nor can he bind them over to appear and answer to an indictment;

and he has no jurisdiction to bind over the prosecutor or person who intends to present an indictment against them. *Re Chapman and the Corporation of the City of London, and Re Chapman and the Water Commissioners of the City of London and the Corporation of the City of London*, 33.

2. *Division Courts*—*New trial granted after fourteen days from trial.*—An action was tried in a Division Court with a jury on the 15th January, when they found for the plaintiff with a recommendation that plaintiff should pay his own and defendant's costs, whereupon judgment was entered for the plaintiff with costs reserved. On January 24th the Judge directed "judgment for plaintiff with costs on verdict of jury." On February 5th an application was made for a new trial which was granted on February 16th.

Held, that the application for the new trial was too late not having been made within fourteen days from the trial as required by sec. 145 of the Division Court Act, *R. S. O. ch. 51*; and a prohibition was therefore directed. *Bland v. Rivers*, 407.

See GAME.**PUBLIC HEALTH ACT.**

R. S. O. ch. 205—"Owner or agent"—*Meaning of plumber.*—By the 6th clause of a city by-law passed under the "Public Health Act," *R. S. O. ch. 205*, it was provided that before proceeding to construct, re-construct, or alter any portion of the drainage, ventilation, or water system of a dwelling house, &c., "the owner or his agent constructing the same" should file in the city engineer's

office an application for a permit therefor, which should be accompanied with a specification or abstract thereof, &c. ; and by the 11th clause, that after the approval of such plan or specification no alteration or deviation therefrom would be allowed, except on the application of the "owner or of the agent of the owner" to the city engineer.

By sec. 22 of the "Public Health Act," owner is defined as meaning the person, for the time being, receiving the rents of the lands on his own account, or as agent or trustee of any such person who would so receive the same if such lands and premises were let :—

Held, that the agent intended by the Act and coming within the terms of the by-law, meant a person acting for the owner as trustee, or in some such capacity, &c., and did not include a plumber employed by the owner to re-construct the plumbing in his dwelling house. *Regina v. Watson*, 646.

RAILWAYS.

1. *Default in payment of compensation moneys—Rights of land-owners — Injunction — Order for possession — Vendor's lien — Order for sale — Remedies.*] — *Held*, that where a railway company had failed to pay the balance of compensation awarded to land-owners in accordance with a judgment obtained for the same, although it had entered into possession and was operating its railway over the lands, the land-owners were entitled to an order declaring them to have a vendor's lien on the lands for the amount, with such provisions as were necessary to realize by means of a sale ;

but they were not entitled to an injunction to restrain the defendants from operating the railway on the lands, nor to an order for delivery up of possession.

Allgood v. Merrybent and Darlington R. W. Co., 33 Ch. D. 571, distinguished. *The Lincoln Paper Mills Company v. The St. Catharines and Niagara Central R. W. Co.*, 106.

2. *Accident — Negligence — Evidence of—Defective brake — Latent defect — Conjecture.*] — Action by plaintiff to recover damages for the death of her husband by reason of, as was alleged, a defective brake on a car on defendants' railway on which deceased was employed as a brakeman :—

Held, that there could be no recovery, for the evidence failed to shew how the accident happened, the contention that it was the defective brake being mere conjecture ; and, even it had been the cause, it would have been no ground of liability, for under the defendant's rules it was the deceased's duty to examine and see that the brakes were in proper working order and report any defect to the conductor ; and if he made the examination he apparently discovered no defect as he made no report, a latent defect being no evidence of negligence ; and and if he omitted to make such examination, etc., then the accident would be attributable to his own negligence. *Badgerow v. The Grand Trunk Railway Co.*, 191.

Semble, that where a railroad crosses a public highway at a level crossing, and it is open to observation that the highway is in a dangerous state, liability will rest upon the operating company for resulting accident, even although a different

company was responsible for the original faulty construction of the railway roadbed which led to the unsafe condition of the highway. *Sibbald v. Grand Trunk R. W. Co. et al.*; *Tremayn v. Grand Trunk R. W. Co. et al.*, 164.

4. *Common carriers—Carriage of goods—Warehousing—Termination of liability—Privity of contract.*—Under a condition in a railway shipping bill the delivery of goods was to be considered complete and the responsibility of the company to terminate when the goods were placed in the company's warehouse at their destination.

The goods were carried to the station at the place of delivery and were placed in the company's shed there used for the purpose of storing goods, where they were subsequently destroyed by fire. The station was some five miles distant from the village where the plaintiff's place of business was:—

Held, that the station was the destination of the goods and not the village: that the shed was a warehouse within the meaning of the condition: and that after the goods were placed there the company's liability was at an end.

Goods were sent by another railway company and were carried by it to its crossing point with defendants' line when the goods were delivered over to defendants to be carried to the plaintiff:—

Held, that an action for the loss of the goods was not maintainable by plaintiff against defendants as there was no privity of contract between them. *Richardson v. Canadian Pacific Railway Company*, 369.

5. *Bondholders' rights to property of—Judgment creditors' right to gar-*

nish earnings—Receiver.—So long as a railway company is a going concern, bondholders whose bonds are a general charge on the undertaking have no right, even although interest on these bonds is in arrear, to seize, or take, or sell, or foreclose any part of the property of the company.

Their remedy is the appointment of a receiver.

The bondholders of the defendants in this case were held not entitled to the moneys claimed by them, which were the earnings of the road deposited in a bank, and which had been attached by judgment creditors of the road.

Decision of *BOYD, C.*, 18 O. R. 581, reversed. *Phelps v. The St. Catharines and Niagara Central Railway Company*, 501.

6. *Warrant for possession of land—R. S. O. ch. 170, sub-sec. 23, sec. 20.*—The application for a warrant for possession of land required by a railway company under sub-sec. 23 of sec 20 of R. S. O. ch 170, should be made to the County Judge and not a Judge of the High Court.

Part I. of the R. S. C. ch. 109, does not apply to the applicants, a company incorporated under a local Act, 52 Vic. ch. 82 (O.), though under Dominion control, as being a railway for the general advantage of Canada, it being only applicable to railways constructed or to be constructed under the authority of a Dominion Act. *The Toronto Belt Line Railway Company v. Lauder*, 607.

As trespassers.—See DAMAGES.

RAPE.

See CRIMINAL LAW, 2.

RECEIVER.

See RAILWAYS, 5.

REGISTRATION.

Of judgment for alimony.—See ALIMONY.

REGISTRY LAWS.

1. *Registration of subsequent deed—Priority—Proof of valuable consideration.*—Registration of a subsequent deed will not give priority over another unregistered deed from the same grantor, prior in point of time, unless a valuable consideration for the former is proved. Mere production or registration of the instrument by the party claiming under it is not sufficient proof for this purpose. *Barber et al. v. McKay et al.*, 46.

2. *Bond for performance of duties of office of Registrar—Payment to municipality of portion of fees—Liability of sureties—R. S. O. ch. 114, secs. 13, 107.*—Action upon a bond of the defendants as sureties for a Registrar of deeds, dated 8th January, 1886, to recover the portion of fees received by him which he should have paid over to the plaintiffs under the Registry Act, R. S. O. ch. 114, sec. 107.

The bond was in the form prescribed by schedule A. of the Act, and was conditioned for the performance of the duties of the Registrar's office and against neglect or wilful misconduct in office to the damage of any person or persons.

The form was prescribed before the introduction of the provisions now contained in sec. 107 of the Registry Act, which by sec. 13

makes provision for the giving of special security for the payment of moneys under sec. 107 :—

Held, that the bond given by the defendants must be taken to be restricted to the performance by the Registrar of the duties imposed upon him other than the duty imposed by sec. 107 ; and the action was dismissed. *County of Middlesex v. Smailman et al.*, 349.

3. *Registry Act—Actual notice—Imputed notice—Relief on ground of mistake—Subrogation—R. S. O. 1887, ch. 114, sec. 80.*—The plaintiff registered a lien against certain lands. On the day before such registration the defendant, an intending purchaser, had searched the registry and found only two incumbrances registered against the property. Shortly after the defendant completed his purchase, and having paid off the two incumbrances, registered discharges thereof with his deed of purchase, but as he did not make a further search, he did not discover the plaintiff's lien :—

Held, affirming the decision of Falconbridge, J., that the defendant was entitled to stand in the place of the incumbrancers whom he had paid off, and to priority over the plaintiff's lien.

The Registry Act does not preclude inquiry as to whether there was knowledge in fact ; and the Court was not compelled as a conclusion of law to say that the defendant had notice of what he was doing, and so could not plead mistake.

Brown v. McLean, 18 O. R. 533, specially considered. *Abell v. Morrison*, 669.

RIGHT OF WAY.

See WAY.

SALE OF GOODS.

Intention of purchaser to set-off a claim against vendor—Fraud.]

The plaintiff with the intention of parting with the possession and property in certain flour made an absolute sale of same, on apparently short terms of credit, to defendant, who withheld from plaintiff his intention to pay for the flour by setting up a claim he had acquired against the plaintiff:—

Held, that this did not constitute a fraud on the defendant's part so as to entitle the plaintiff to disaffirm the contract and replevy the flour. *Baker v. Fisher*, 650.

SALE OF LAND.

1. *Agreement—When payment to be made—Title—Prior mortgage—Time to take possession—Interest.*]

In an agreement for the sale of land it was provided that the cash payment should be made and the mortgage for the balance given, "so soon as the solicitors for the purchaser shall be satisfied with the title:"—

Held, that the meaning of the contract was that payment was not to be required, until such title was shown as would justify the purchaser in taking possession, and following

Wells v. Maxwell, 32 Beav. 552, that no satisfaction being given as to a prior mortgage affecting the land until two years after the agreement, the purchaser could not prudently take possession until then, and interest on the purchase money should only be allowed from that time. *Re McLean and Walker*, 161.

2. *Title to land—Private Acts—Equitable interest—Person not named in Private Act—Canada*

Agency Association—Colonial Securities Company—32 Vic. ch. 62, sec. 5, (O.)—36 Vic. ch. 121, sec. 5, (O.)—R. S. O., 1887, ch. 1, sec. 8, sub-s. 47.]

On a reference as to title to land, it appeared that one H. entrusted certain moneys to a Loan Association to invest for her on mortgage, under an agreement that the Association should guarantee to her payment of interest at seven per cent. and in consideration thereof should retain to their own use all interest over that rate. The mortgage, which recited the said agreement, was taken to the trustees appointed by the Association, and was made in 1861. By 32 Vict. ch. 62, sec. 5, (O.) all lands, mortgages, &c., held by trustees of the Association were to be deemed vested in the C. S. Company, so that the same might be sold, assigned, &c., by the latter. Subsequently the mortgagor released his equity of redemption to the C. S. Company, in full satisfaction of the mortgage moneys, but not so as to merge the mortgage. By 36 Vic. ch. 121, sec. 5, (O.) all lands mortgages, &c., held by the C. S. Company, were to be deemed vested in the C. T. Company, so that the same might be sold, assigned, &c., by the C. T. Company. Afterwards the latter company conveyed the lands to the vendor.

Held, that, inasmuch as the above Acts made no mention of H., the vendor could not make a good title free from her claim, who, unless the moneys advanced by her had been repaid, was in equity substantially the owner of the mortgage, and if she chose to adopt the act of the trustees in taking a conveyance of the equity, then of the land. *Macklin v. Dowling*, 441.

SEDUCTION.

Action by brother — Loss of service — Infant defendant — Non-appointment of guardian—Rules 261, 313.—In an action for seduction it appeared that the plaintiff was the brother of the girl seduced; and that the girl, though in the service of another person, yet (by agreement with her mistress, entered into at the time of her engagement) was at liberty to perform, and did perform certain services at home for the plaintiff, under contract with him for which she received compensation:

Held, that the plaintiff was entitled to maintain the action.

Rist v. Faux, 4 B. & S. 409, specially referred to; *Thompson v. Ross*, 5 H. & N. 16, distinguished.

It also appeared that the defendant was not quite of age, and that no guardian had ever been appointed, but that the fact of infancy was well-known to the defendant's parents and to the solicitor and counsel who appeared for him at the trial, and no objection on this ground was taken till this motion before the Divisional Court:

Held, that under Rules 261 and 313, the appointment of a guardian was not imperative; the Court had a discretion; and in this case the judgment obtained against the defendant at the trial should not be interfered with.

Furnival v. Brooke, 49 L. T. N. S. 134, followed. *Straughan v. Smith*, 558.

SHARES.

Pledge of for loan—Transfers “in trust” — Pledge by transferee for larger loan—Notice of trust—Right to redeem — Measure of value.—

Certain shares not numbered or capable of identification, transferable on the books of a company, were transferred by the plaintiff to brokers, “in trust” as security for the payment of a loan. The plaintiff's transferees afterwards transferred the shares to others as security for other and larger sums due by them than were due by plaintiff to them. Each transfer subsequent to that of the brokers was made “in trust.”

The plaintiff was aware that the brokers were raising money on his shares, but was assured by them that he could redeem his stock on payment of the amount due by him.

The brokers being unable to redeem the shares, in an action by the plaintiff against the last transferees, who had sold them for a large sum after tender by plaintiff of amount due by him, to compel them to account for their value:—

Held, that the form of the transfer to the last holders was sufficient to put them on enquiry, and that they were chargeable with notice of the facts and of the plaintiff's rights in regard to the shares; and that he was entitled to the value of the stock after payment of the amount he had borrowed on it from the brokers, and that the value of the shares was to be taken at their highest market value between plaintiffs tender and the conclusion of the trial herein. *Duggan v. The London and Canadian Loan and Agency Company et al.*, 272.

SPECIFIC PERFORMANCE.

Discovery of want of title—Reputation on other grounds—Control of title—Fraud.—To an action for specific performance of an agreement

for the exchange of lands the agreement was admitted, the only defence being fraud and a repudiation therefor. A month prior to the trial, the defendant ascertained that the plaintiff's wife and not the plaintiff was the owner of the land, and that she had executed a deed thereof to be delivered to the defendant. No claim for repudiation was made on the ground of want of title. At the trial the defendant was allowed to amend by setting up that neither at the time of the agreement nor at the commencement of the action was the plaintiff the owner of the land, without any averment that on the discovery thereof the defendant repudiated on such ground:—

Held, that the amended defence constituted no answer to the action, and that the defendant not having repudiated when he ascertained the plaintiff had no title, it was sufficient if the plaintiff made title on the reference therefor. *Paisley v. Wills*, 303.

Of building lease.]—See TRUSTS AND TRUSTEES, 2.

STATUTES.

C. S. U. C., ch. 103, sec. 9.]—See CRIMINAL LAW, 1.

29 & 30 Vic. ch. 122.]—See GAME.

32 Vic. ch. 62, sec. 5 (O).]—See SALE OF LAND, 2.

36 Vic. ch. 121, sec. 5 (O).]—See SALE OF LAND, 2.

37 Vic. ch. 38, sec. 5 (D).]—See CRIMINAL LAW, 1.

38 Vic. ch. 16, secs. 1, 5 (O).]—See LIMITATIONS OF ACTIONS.

46 Vic. ch. 27, sec. 13 (O).]—See WATERS AND WATERCOURSES, 3.

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R. S. C. ch. 1, sec. 7, sub-sec. 22.]—See PROHIBITION, 1.

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R. S. C. ch. 123, secs. 12-14.]—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.

R. S. C. ch. 129, sec. 83.]—See COMPANY, 2.

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R. S. C. ch. 157, sec. 3.]—See CRIMINAL LAW, 3.

R. S. C. ch. 157, sec. 8, sub-sec. 2.]—See JUSTICE OF THE PEACE, 2.

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R. S. C. ch. 163, sec. 4.]—See CRIMINAL LAW, 1.

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R. S. C. ch. 174, secs. 80, 140.]—See PROHIBITION, 1.

R. S. C. ch. 178, sec. 62.]—See JUSTICE OF THE PEACE, 2.

R. S. O. ch. 1, sec. 8, sub-sec. 47.]—See SALE OF LAND, 2.

R. S. O. ch. 25, sec. 20, sub-sec. 2.]—See EXECUTION.

R. S. O. ch. 44, sec. 30.]—See ALIMONY.

R. S. O. ch. 44, sec. 62.]—See COURTS.

R. S. O. ch. 51.]—See PROHIBITION, 2.

R. S. O. ch. 61, sec. 10.]—See HUSBAND AND WIFE, 4.

R. S. O. ch. 74, sec. 1.]—See CONVICTION.

R. S. O. ch. 102, sec. 30.]—*See* MORTGAGE, 1.

R. S. O. ch. 104, sec. 4, sub-sec. 2.]—*See* MORTGAGOR AND MORTGAGEE.

R. S. O. ch. 108.]—*See* VENDOR AND PURCHASER, 2.

R. S. O. ch. 108, sec. 4, sub-sec. 2.]—*See* DEVOLUTION OF ESTATES ACT.

R. S. O. ch. 111, secs. 4, 43.]—*See* LIMITATION OF ACTIONS.

R. S. O. ch. 114, secs. 13, 107.]—*See* REGISTRY LAWS, 2.

R. S. O. ch. 114, sec. 80.]—*See* REGISTRY LAWS, 3.

R. S. O. ch. 124.]—*See* BANKRUPTCY AND INSOLVENCY, 1, 2.—MORTGAGE, 2.

R. S. O. ch. 124, sec. 2.]—*See* BANKRUPTCY AND INSOLVENCY, 3.

R. S. O. ch. 124, sec. 7, sub-sec. 2.]—*See* BANKRUPTCY AND INSOLVENCY, 4.

R. S. O. ch. 124, sec. 9.]—*See* ALIMONY.

R. S. O. ch. 125, sec. 6.]—*See* BILLS OF SALE AND CHATTEL MORTGAGES.

R. S. O. ch. 132, secs. 3, 14.]—*See* HUSBAND AND WIFE, 1.

R. S. O. ch. 141, sec. 3.]—*See* MASTER AND SERVANT, 1.

R. S. O. ch. 154.]—*See* INNKEEPER.

R. S. O. ch. 167, sec. 132.]—*See* INSURANCE, 3.

R. S. O. ch. 170, sec. 20, sub-sec. 23.]—*See* RAILWAYS, 6.

R. S. O. ch. 171.]—*See* INJUNCTION.

R. S. O. ch. 183.]—*See* COMPANY, 2.

R. S. O. ch. 184, sec. 289.]—*See* JUSTICE OF THE PEACE, 1.

R. S. O. ch. 184, sec. 489, sub-sec. 42.]—*See* MUNICIPAL CORPORATIONS, 4.

R. S. O. ch. 184, sec. 550, sub-sec. 8.]—*See* MUNICIPAL CORPORATIONS, 2.

R. S. O. ch. 184, sec. 565.]—*See* MUNICIPAL CORPORATIONS, 3.

R. S. O. ch. 193, sec. 2, sub-sec. 10, secs. 34, 35, 36.]—*See* ASSESSMENT AND TAXES.

R. S. O. ch. 194.]—*See* LIQUOR LICENSE ACT.—MANDAMUS.

R. S. O. ch. 194, sec. 12.]—*See* INNKEEPER.

R. S. O. ch. 194, secs. 49, 70, 105.]—*See* JUSTICE OF THE PEACE, 3.

R. S. O. ch. 194, sec. 70.]—*See* INTOXICATING LIQUORS.

R. S. O. ch. 205.]—*See* CONVICTION.

R. S. O. ch. 205, secs. 6, 11, 22.]—*See* PUBLIC HEALTH ACT.

R. S. O. ch. 205, sec. 49.]—*See* MUNICIPAL CORPORATIONS, 1.

R. S. O. ch. 208, sec. 15.]—*See* MASTER AND SERVANT, 1.

R. S. O. ch. 208, sec. 15, sub-sec. 4.]—*See* MASTER AND SERVANT, 2.

R. S. O. ch. 221, sec. 10.]—*See* GAME.

52 Vic. ch. 32 (D.)]—*See* COMPANY, 2.

52 Vic. ch. 82 (O.)]—*See* RAILWAYS, 6.

53 Vic. ch. 44, sec. 4 (O.)]—*See* INSURANCE, 3.

Statute of Limitations.]—*See* LIMITATIONS STATUTE OF.

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STOCK AND STOCKHOLDERS.

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STREET RAILWAY.

Operating on Sunday.]—*See* INJUNCTION.

SUBROGATION.

See REGISTRY LAWS, 3.

SUNDAY.

Restraining street railway from operating on.—See INJUNCTION.

SURETY.

See REGISTRY LAWS, 2.

TAVERNS AND SHOPS.

By-law fixing license fee in excess of \$200—Delay in moving to quash.—A by-law requiring amounts to be paid for tavern license fees in excess of \$200, directed, as required, the votes of the electors to be taken thereon. The by-law was passed on the 25th February, 1889, and on 8th April, 1890, a motion was made to quash it on the ground that the votes of all the duly qualified electors had not been taken thereon, but only those of freeholders. By reason of the by-law the number of licenses was decreased, and had the motion been allowed it would have been too late for the corporation to make any change, by increasing the number of licenses so as to make up the deficiency, or to submit a new by-law. The only evidence in support of the motion was very weak and no person whose vote had been rejected complained. The applicant himself was a tavernkeeper who had obtained a license for the year 1889, under the by-law without any objection, and had applied again for the current year :—

The by-law being valid on its face the Court, under the circumstances,

considering the lapse of time before motion made, in the exercise of its discretion refuse to interfere. *Bann v. Brockville*, 409.

Owner of tavern license.—See INNKEEPER.

See also MANDAMUS.

TELEPHONE.

Liability of company in moving objects coming in contact with wires, and causing damage. See MUNICIPAL CORPORATIONS, 5.

TENANT BY THE CURTESY.

See STATUTE OF LIMITATIONS.

TIME.

Giving time by renewals of notes.—See MORTGAGE, 3.

Of will taking effect.—See DEVOLUTION OF ESTATES ACT.

Delay in moving to quash by-law.—See TAVERNS AND SHOPS.

TITLE.

By possession.—See LIMITATION OF ACTIONS—LANDLORD AND TENANT.

Discovery of want of.—See SPECIFIC PERFORMANCE.

See, also, SALE OF LAND, 2.

TRUSTS AND TRUSTEES.

1. *Investment of moneys left to infants by will—Deposit in savings*

bank—Liability of trustee for legal interest—Acquiescence of statutory guardian of infants—Costs.]—Where moneys are left by will to be invested at the discretion of the executor or trustee, the discretion so given cannot be exercised otherwise than according to law, and does not warrant an investment in personal securities or securities not sanctioned by the Court. And

Held, that an executor and trustee who deposited funds so left in trust for infants, at three and a half or four per cent. interest, in a savings bank, did not conform to his duty; and his failure to do so exposed him to pay the legal rate of interest for the money, although he acted innocently and honestly; and the acquiescence of the statutory guardian of the infants, not being for their benefit, did not relieve him.

Held, also, that defendant was not entitled to costs out of the fund, but that he should be relieved from paying costs. *Spratt et al. v. Wilson*, 28.

2. *Provisions of will—Implied powers of trustees—Reasonable building lease—Specific performance of agreement for.*]—The plaintiffs were trustees under a will, holding the legal estate in the property devised and bequeathed, in trust to maintain themselves and their children, with remainder over to the children upon the death of themselves; with power to absolutely convey the property and to exclude any child from participating in the remainder:—

Held, that the plaintiffs had implied power to make all reasonable leases. The plaintiffs made an agreement for a building lease to the defendant of part of the trust estate for twenty-one years, with a provision for compensation to the defendant at

the end of the term for his improvements, and the draft lease settled provided that the plaintiffs should at the end of the term pay for such improvements or renew the lease for a further term of twenty-one years:—

Held, that the provisions of the agreement and lease were reasonable, and bound the trust estate, and that the plaintiffs were entitled to specific performance. *Brooke et al. v. Brown*, 124.

3. *Breaches of trust—Taking securities in name of one of two joint trustees—Pledging securities for advance—Misapplication of moneys advanced—Following securities in hands of pledgee.*]—One of two joint trustees assumed to lend trust moneys on the security of mortgages on land, taking the mortgages to himself alone “as trustee of the estate and effects of J. C., deceased.” These mortgages were hypothecated by him to, and moneys were advanced to him by, the defendants, ostensibly to meet an unexpected call by one of the beneficiaries; but the moneys were not so applied, nor otherwise for the benefit of the estate, and they were not required for any such purposes under the terms of the will creating the trust.

In an action by the other trustee and two new trustees, who were also beneficiaries, appointed in his stead:

Held, that he had been guilty of two breaches of trust, and that the plaintiffs were entitled to follow the trust securities and to make the defendants account for all moneys received by them thereunder. *Cumming et al. v. Landed Banking and Loan Co.*, 426.

Breach of by director.]—See COMPANY, 2.

See also WILL, 2.

VENDOR AND PURCHASER.

1. *Exchange of lands — Lands subject to mortgage — Liability of purchaser to pay.*]—A purchaser of an equity of redemption is bound as between himself and his vendor to pay off the incumbrances, and this quite irrespective of the frame of the contract between the parties.

Where therefore lands were exchanged between the plaintiff and defendant which were subject to certain mortgages, the defendant was held bound to pay off those on the lands conveyed to him, and to protect the plaintiff from liability thereon. *Boyd v. Johnston*, 598.

2. *Title—"Devolution of Estates Act"*—*Outstanding mortgage—Matters of conveyancing and matters of title—R. S. O. 1887, c. 108.*]—On a sale of lands the purchaser objected to the title on the grounds (1) that there was no evidence that a certain mortgage had been discharged and (2) that the title being deduced through the devisee of a person who had died since the coming into force of the "Devolution of Estates Act," R. S. O., 1887, c. 108, the legal estate was outstanding in the executor of such person. It appeared that all debts of the testator had been paid:—

Held, that both matters were matters of conveyancing, and not of title.

Under the "Devolution of Estates Act," where debts have been paid, or where there are no debts, executors will hold the bare legal estate for the devisee of the land of the deceased. *Martin v. Magee et al.*, 705.

Rights of as to damages under agreement for sale of land.]—See DAMAGES.

See also SALE OF LAND, 2.

VENDOR'S LIEN.

See RAILWAYS, I.

VOLUNTARY CONVEYANCE.

Transaction improvidently carried out and without professional advice —Setting aside.]—One of the plaintiffs was the owner of a farm valued at about \$4,500, and being, as was also his wife, old and feeble and incapable of doing much manual labor, and also illiterate, negotiated with the defendant, the wife's nephew, a young man, with the object of effecting an arrangement for their support and maintenance. The defendant without permitting the husband plaintiff to obtain independent advice induced him and his wife to execute a deed to defendant, the latter giving them back a life lease. The consideration of the deed was natural love and affection \$1, and the life lease. The habendum and covenants for quiet enjoyment were made subject to the lease and the covenants therein. The annual rental in the lease was \$1 with a covenant for quiet enjoyment, and a special covenant by defendant to support and maintain the plaintiffs, on performance of which he was to have the proceeds of the land. The defendant was also to pay \$30 in cash yearly, and provide plaintiff with a horse and vehicle and house room. On failure by defendant to perform such provisions plaintiffs were to have the proceeds of the land on giving defendant two months notice in writing, and if the default still continued plaintiffs were to be at liberty to take steps to eject defendant. The deed did not contain any power of revocation in case of defendant's default:

Held, under the circumstances, the deed and life lease must be set aside. *Hagarty v. Bateman*, 381.

WAIVER.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES**, 1.

WAREHOUSE.

See **RAILWAYS**, 4.

WAREHOUSE RECEIPTS.

See **BANKS AND BANKING**.

WATERS AND WATERCOURSES

1. *Definition of watercourse*—*Surface-water*.]—A watercourse entitled to the protection of the law is constituted if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and defined channel. It is not essential that the supply of water should be continuous or from a perennial living source. It is enough if the flow arises periodically from natural causes and reaches a plainly-defined channel of a permanent character. *Beer v. Stroud*, 10.

2. *Easement* — *Prescriptive rights* — *Dominant and servient tenements* — *Lease of servient tenement* — *Unity of possession* — *Suspension of easement* — *Joint owners of mill dam* — *Injunction* — *Damages*.]—One of two joint owners of a mill dam, each having a mill on the opposite sides of the river by which the dam was formed, was entitled to a prescriptive right to the supply of water as furnished by the dam all the way across the river and to dam back the water on to the plaintiff's land, but the other owner was not.

In an action to restrain both owners from backing the water to the detriment of the plaintiff:—

Held, that the dam as a piece of property was an entire thing and that the plaintiff was not entitled to an injunction restraining the use of the water, his remedy being in damages against the owner not entitled to the easement.

A right to an easement previously enjoyed cannot be acquired by the lapse of time during which the owner of the dominant tenement has a lease of the land over which the right would extend. During such unity of possession the running of the Statute of Limitations is suspended. *Stothart v. Hilliard et al.*, 542.

3. "*Ditches and Watercourses Act, 1883*" — *Work not in accordance with award* — *Remedy under sec. 13* — *Costs*.]—Where an award has been made under the "*Ditches and Watercourses Act, 1883*," the only remedy for the non-completion of the work in accordance with the award is that provided by sec. 13 of the Act.

Murray v. Dawson, 17 C. P. 588, followed; and *O'Byrne v. Campbell*, 15 O. R. 339, distinguished.

No other or greater costs were allowed to the defendants than if they had successfully demurred instead of defending and going down to trial. *Hepburn v. Township of Orford et al.*, 585.

WAY.

Easement — *Severance of tenement by devise* — *Reasonable enjoyment of parts devised* — *Necessary rights of way*.]—Upon the severance of a tenement by devise into separate parts, not only do rights of way of strict necessity pass, but also rights of way necessary for the reasonable enjoyment of the parts devised, and

which had been and were up to the time of the devise used by the owner of the entirety for the benefit of such parts. *Briggs v. Semmens et al.* 522.

WIFE.

See HUSBAND AND WIFE.

WILL.

1. *Validity of—Instructions for—Mental and physical capacity of testator—Donatio mortis causa—Sufficiency of.*]—The testator when nearly eighty years of age executed a will devising the whole of his estate to a son and daughter by his first marriage to the exclusion of his wife and other children of the second marriage. At the time of its execution he was on his death-bed, staying with his daughter in the United States, having shortly before left his farm in Ontario without any notice to his wife and other children. For some time before he had been afflicted with a complication of diseases rendering him incapable of managing his farm, and which resulted in his death shortly after the execution of the will in question. A will was prepared by an attorney practising in the place the testator was staying, leaving everything to the daughter, solely on the instructions of her husband. On this being read over to the testator, who was lying in bed and unable to rise, suffering great physical and mental prostration, he remarked that it was not right, that he wanted the son's name in it too. The will in question was then prepared, and after being read over to him, without explanation as to the effect of the language used, was executed by him, with assistance, with great difficulty.

The attorney and medical man in attendance were of opinion that he had sufficient mental capacity to make a will. The same attorney had sometime before induced him to refrain from making a similar will. Shortly before the execution of the will he had handed to his daughter a bank deposit receipt which she had transferred to her name, and partly used, he stating that he wanted her to take care of him, and that he was going to have a will drawn. From the evidence it appeared that the testator, as well as his daughter, were under the impression that the will had reference to the deposit receipt only:—

Held, (varying the judgment of the trial Judge) that the will was invalid, its execution under the circumstances of the testator's condition, and the absence of any explanation to him of the effect of his testamentary act, being a fraud on the part of those concerned in procuring its execution:—

Held, also, that the gift of the deposit receipt was a valid *donatio mortis causa*. *Freeman v. Freeman*, 141.

2. *Rule in Shelley's Case—Trust—Restraint on alienation by sale but not by mortgage—Rule against perpetuities.*]—A testator by his will devised certain lands to his son N. M., for life, and after his decease to his heirs and assigns forever, but subject to the payment within three years out of the rents and income of a sum of money charged upon the lands therein specified; after his death the land was to be sold provided N. M.'s youngest child then living was of the age of twenty-one years, the proceeds thereof to be equally divided between N. M.'s children at the time of the sale:—

Held, affirming the judgment of STREET, J., at the trial, that under the rule in *Shelley's Case* N. M. took an estate in fee simple in the land, but reversing it so far as it held that there was a trust in favour of N. M.'s children.

Held, also, that by the terms of the will there was a restraint on alienation by sale, but not by mortgage.

Held, lastly that the executory devise in favour of N. M.'s children was void as a violation of the rule against perpetuities. *Meyers v. The Hamilton Provident and Loan Company*, 358.

3. *Devise — Forfeiture — Actual possession and occupation—Possession by servant, caretaker, or worker on shares.*—S. M. had become entitled under T. C. S.'s will to certain property called "Clarke Hill," of which T. C. S. was owner when he died, and also to an undivided interest in certain other property of which T. C. S. was tenant in common. He also became entitled to a legacy under the following clause of A. H. S.'s will: "I will and direct that so soon as S. M. * * can and does take actual possession of the real estate and property * * under the will of T. C. S. * * my executors * shall * * so long as he remains the owner and actual occupant of the said real estate pay over to him * * the annual sum of \$2,000 to enable, &c.":—

Held, that this clause, read in connection with the will of T. C. S., referred only to the land of which T. C. S. was absolute owner, and not to the land he owned as tenant in common:—

Held, also, that actual possession and occupation of the land by S. M. was consonant with and satisfied by the possession of a servant or care-

taker, or even a worker on shares, and that S. M.'s temporary absence from the mansion house on the property, which was kept furnished and in charge of a servant, did not create a forfeiture. *Macklem v. Macklem et al.*, 482.

See TRUSTS AND TRUSTEES, 2.

WINDING-UP ACT (DOM.)

See COMPANY, 1, 2.

WINDING-UP ACT (ONT.)

See COMPANY, 2.

WORDS.

"Anything done under this Act."]
—See HIDES.

"Branch."—See ASSESSMENT AND TAXES.

"Defect."—See MASTER AND SERVANT, 1.

"Given for a patent right."—See BILLS OF EXCHANGE AND PROMISSORY NOTES, 1.

"Mineral."—See MUNICIPAL CORPORATIONS, 3.

"Moving."—See MASTER AND SERVANT, 1.

"Owner or agent" in *R. S. O. ch. 205, sec. 6.*—See PUBLIC HEALTH ACT.

"Person"—See PROHIBITION, 1.

"Personal property."—See ASSESSMENT AND TAXES.

"Place of business."—See ASSESSMENT AND TAXES.

"Total disability."—See INSURANCE, 1.

"Watercourse."—See WATERS AND WATERCOURSES, 1.

WORKMENS COMPENSATION [FOR INJURIES ACT.

See MASTER AND SERVANT, 1, 2, 3.

